IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 23-0575

RIKKI HELD, et al.,

Plaintiffs / Appellees

v.

STATE OF MONTANA, et al.,

Defendants / Appellants

PLAINTIFFS/APPELLEES' ANSWER BRIEF

On appeal from the Montana First Judicial District Court, Lewis and Clark County
Cause No. CDV 2020-307, the Honorable Kathy Seeley, Presiding

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BER	Board of Environmental Review
BOGC	Montana Board of Oil & Gas Conservation
CO_2	Carbon Dioxide
COL	Conclusions of Law
Const. Con.	Montana Constitutional Convention Transcript
DEQ	Montana Department of Environmental Quality
DNRC	Montana Department of Natural Resources and Conservation
EA	Environmental Assessment
EPA	U.S. Environmental Protection Agency
FERC	Federal Energy Regulatory Commission
FOF	Findings of Fact
GHG	Greenhouse Gas
IPCC	Intergovernmental Panel on Climate Change
Judicial Prohibition	§75-1-201(6)(a)(ii), MCA
MCA	Montana Code Annotated
MEIC	Montana Environmental Information Center
MEPA	Montana Environmental Policy Act
MEPA Limitation	§75-1-201(2)(a), MCA
NEPA	National Environmental Policy Act
NHTSA	National Highway Traffic Safety Administration

NRDC	Natural Resources Defense Council
PIRG	Public Interest Research Group
ppm	parts per million
TWA	Trans World Airlines

CITATION FORMS

Citations to the August 14, 2023 Findings of Fact, Conclusions of Law, and Order (Doc. 405) use the following format:

> Findings of Fact: "FOF [number]." The District Court's FOFs cite to the witness testimony, exhibits, and trial demonstratives in the trial record, which pin citations are generally not included herein.
>
> Conclusions of Law: "COL [number]."
>
> Order: "Order [number]."

Citations to the District Court record use the following format: "Doc. [docket entry number] at [page number]."

Citations to the District Court trial transcript use the following format: "Tr. [page number: line number]."

Citations to trial exhibits use the following format: "P[exhibit number] at [bates number]."

Citations to trial demonstratives use the following format: "[expert initials]-[demonstrative number]." For example, Dr. Lori Byron: LB-27.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW[1]

1. Did the District Court correctly conclude, based on unrefuted findings of fact after trial, that Plaintiffs established case-or-controversy standing?

2. Did the District Court correctly conclude, based on unrefuted findings of fact after trial, that the MEPA Limitation and Judicial Prohibition violate Plaintiffs' fundamental right to a clean and healthful environment and are facially unconstitutional?

3. Did the District Court abuse its discretion in denying Defendants' motion for Rule 35(a) psychological examinations in this constitutional case, where Plaintiffs did not bring tort claims or seek damages, and Defendants failed to show good cause to justify such an intrusive discovery tool?

STATEMENT OF THE CASE

Sixteen Montana children and youth, seeking to protect their fundamental and inalienable rights, brought this case challenging state laws and government conduct that endanger them and undermine their ability to live safe, healthy, dignified, and productive lives. At a seven-day trial in June 2023, Plaintiffs proved that Defendants control and perpetuate Montana's fossil-fuel based energy system, which results in dangerous emissions of greenhouse gas ("GHG") pollution, every ton of which is causing and contributing to the worsening climate crisis and preventing climate recovery. Plaintiffs proved that §75-1-201(2)(a), MCA, the "MEPA Limitation"—

[1] The *amicus* briefs filed in support of Defendants raise many issues beyond the scope of the issues presented for review by the parties, not addressed by the District Court, and lacking any support in the evidentiary record. Such issues are extraneous to the issues before this Court. *Reichert v. State ex rel. McCulloch*, 2012 MT 111, ¶¶25-26.

which prohibits state agencies from analyzing GHG pollution and climate change impacts during environmental reviews—makes it impossible for Defendants to make fully informed, constitutionally compliant permitting decisions, or to administratively justify a decision to deny a fossil fuel permit to carry out their constitutional obligations. The evidence at trial established that Defendants' uninformed and unfettered permitting of fossil fuel projects has increased Montana's GHG emissions, causing and contributing to Plaintiffs' ongoing and worsening injuries, and violates Plaintiffs' constitutional rights.

Following trial, the District Court issued its Findings of Fact, Conclusions of Law, and Order on August 14, 2023, holding: (1) Plaintiffs had proven standing; (2) Plaintiffs have a fundamental constitutional right to a clean and healthful environment, which includes climate as part of the environmental life-support system; (3) the MEPA Limitation and §75-1-201(6)(a)(ii), MCA (hereinafter "Judicial Prohibition"),[2] infringe Plaintiffs' fundamental constitutional rights, including their right to a clean and healthful environment, and are facially unconstitutional; (4) the MEPA Limitation and Judicial Prohibition do not pass strict scrutiny; and (5) Plaintiffs are entitled to injunctive relief barring Defendants from

[2] Defendants did not appeal the District Court's determination that the Judicial Prohibition is unconstitutional, and have therefore waived any arguments related to its constitutionality. *Mountain W. Farm Bureau Mut. Ins. Co. v. Brewer*, 2003 MT 98, ¶9.

enforcing or acting in accordance with the statutes declared unconstitutional. COL #1-67; Order #1-10; Doc. 417 at 6.

Underlying the District Court's legal conclusions are 289 factual findings, based on an extensive evidentiary record. At trial, the District Court heard testimony from twelve of the youth Plaintiffs, the father/guardian of two additional Plaintiffs, and Mae Nan Ellingson (formerly Robinson), the youngest Constitutional Convention delegate. FOF #195-207, 284; OPN-1, MNE-18. Never before in our nation's history has a group of youth Plaintiffs testified in court about how they are being harmed by climate change. The Plaintiffs offered deeply personal and moving testimony about climate injuries they are struggling to endure, their deep love for Montana, and the fear that grips them when thinking about a future of unmitigated climate harms. For example, Rikki Held, who is from Broadus and has been riding horses and herding cattle on her family's ranch since she was four years old, described the intense physical burden that comes with working on the ranch in extreme heat when the air is filled with smoke from climate-induced wildfires. Tr. 68:3-10, 69:11-23; FOF #195(g). Rikki testified to the stress and emotional burden that comes with watching extreme heat, drought, wildfires, and floods fundamentally alter her home, ranch, and community for the worse. Tr. 60:16-61:1, 78:1-12; FOF #195, 195(c), 195(n). Expert scientists and medical professionals verified that

Rikki's injuries were real and would worsen with more GHG pollution. FOF #110, 112, 115, 117, 125, 130, 137.

The District Court heard testimony from ten of Plaintiffs' experts: climate scientist Dr. Steven Running; Dr. Cathy Whitlock, lead author of the authoritative 2017 Montana Climate Assessment; Dr. Dan Fagre, a glaciologist with decades of experience studying Glacier National Park; Dr. Jack Stanford, an expert in freshwater ecology and director *emeritus* of the Flathead Lake Biological Station; Dr. Lori Byron, a pediatrician, and Dr. Lise Van Susteren, a psychiatrist, both of whom have extensive experience treating patients, including children, impacted by air pollution and climate change; Mr. Michael Durglo Jr., who, in his role as Chairman of the Climate Change Advisory Committee for the Confederated Salish and Kootenai Tribes, has worked extensively with tribal elders and youth on climate related issues; Ms. Anne Hedges, a policy and legislative expert who has worked on climate, pollution, and energy issues in Montana for over three decades, and has extensive experience with fossil fuel permitting and MEPA; Mr. Peter Erickson, a renowned expert in GHG emissions accounting; and Dr. Mark Jacobson, an expert in environmental engineering who has developed decarbonization plans for all fifty states. FOF #65-66, 100-103, 151, 162, 209-210, 269.

The District Court also found facts based on the testimony of Defendants' three witnesses: DEQ Director Chris Dorrington; DEQ Division for Air, Energy, &

Mining Administrator Sonja Nowakowski; and DNRC employee Shawn Thomas (via perpetuation deposition). The District Court found Defendants' economist Dr. Terry Anderson's testimony was not well-supported, contained errors, and was therefore accorded no weight. FOF #211. Collectively, the testimony of these twenty-eight witnesses, and the 172 admitted exhibits, provide the evidentiary foundation for the District Court's August 14 Order.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. Relevant Procedural History[3]

Plaintiffs' Complaint for Declaratory and Injunctive Relief was filed on March 13, 2020. Doc. 1. Defendants filed a motion to dismiss, which the District Court partially granted and partially denied, allowing Plaintiffs' claims requesting declaratory relief and attendant injunctive relief to move forward. Doc. 46 at 25. On September 17, 2021, Defendants filed their Answer, denying virtually every allegation in Plaintiffs' Complaint. Doc. 54.

During discovery, the parties conducted thirty-six depositions, exchanged twenty-two expert reports, served over 50,000 pages of documents, and responded to dozens of interrogatories. Defendants moved to conduct psychological examinations of several Plaintiffs pursuant to Rule 35, M.R.Civ.P. Doc. 173. The

[3] For the full procedural history of this case, see Doc. 405 at 1-9 and Doc. 428 at 2-3.

District Court denied Defendants' motion, ruling that such examinations were unwarranted because Plaintiffs' mental health was not in controversy and because Defendants failed to establish good cause for the examinations. Doc. 225 at 6-7.

Defendants moved for summary judgment, though failed to provide a statement of uncontested facts. Doc. 290. The District Court denied Defendants' motion for summary judgment, finding Defendants had failed to carry their burden to show there were no factual disputes, while Plaintiffs had supported their allegations with specific facts, thereby allowing Plaintiffs' MEPA Limitation claims to proceed to trial. Doc. 379 at 5-6, 13-14, 25.

Several Legislative enactments affected this case as it proceeded to trial. First, on March 16, 2023, Governor Gianforte signed into law House Bill 170, repealing the entirety of the Montana State Energy Policy, including the fossil fuel-based provisions Plaintiffs had challenged as unconstitutional, §90-4-1001(1)(c)-(g), MCA. Thereafter, Defendants moved to dismiss Plaintiffs' State Energy Policy Act claims, which the District Court granted without prejudice. Doc. 379 at 3-4.

Second, on May 10, 2023, Governor Gianforte signed into law House Bill 971—clarifying that the MEPA Limitation prohibits state agencies from considering GHG emissions and corresponding impacts to the climate in their MEPA reviews. §75-1-201(2)(a), MCA (2023). Following HB 971's enactment, Defendants filed a motion to dismiss Plaintiffs' MEPA claims, which the District Court denied. Doc.

384 at 38. The District Court, and thereafter this Court, ruled there was no practical difference between the 2011 version of the MEPA Limitation and the 2023 MEPA Limitation and the constitutional issue remained live for trial. Doc. 379 at 21-25; *State v. Mont. First Jud. Dist. Ct., Lewis & Clark Cnty*., No. OP 23-0311, at 3-4 (Mont. June 6, 2023) (theory of the MEPA claims has always "been that prohibiting consideration of the impacts of climate change in environmental review violates the Montana Constitution").

Third, on May 19, 2023, Governor Gianforte signed into law Senate Bill 557, amending several provisions of MEPA and enacting §75-1-201(6)(a)(ii), MCA (2023), which eliminated equitable remedies for MEPA violations. During trial, the Parties filed bench memoranda addressing SB 557. Plaintiffs presented evidence establishing the unconstitutionality of the newly enacted §75-1-201(6)(a)(ii), MCA, and its unconstitutional barriers to redressability. Doc. 396.

The District Court conducted the trial from June 12 to June 20, 2023, and issued Findings of Fact and Conclusions of Law on August 14, 2023. Doc. 405. Thereafter, Defendants filed their separate appeals.

B. Findings of Fact Based on Uncontroverted Evidence at Trial

The uncontroverted evidence adduced at trial established that GHG pollution and climate change are fundamentally altering, degrading, and depleting Montana's climate, environment, and natural resources—resources essential to Plaintiffs'

health, safety, dignity, and well-being. FOF #140-193. The undisputed evidence also demonstrated Plaintiffs are experiencing particularized injuries to their physical and mental health, homes and property, tribal and cultural traditions, economic security, and recreational, spiritual, and aesthetic interests as a result of GHG pollution, climate change, and the degradation of Montana's natural environment. FOF #195-207. While Plaintiffs are *already* being harmed, the evidence proved that, "[u]ntil atmospheric GHG concentrations are reduced, extreme weather events and other climactic events such as drought and heatwaves will occur more frequently and in greater magnitude, and Plaintiffs will be unable to live clean and healthy lives in Montana." FOF #89.

There is no dispute that Defendants control Montana's energy system and have exercised that control to consistently approve fossil fuel projects—including coal- and gas-fired power plants, coal mines, oil and gas extraction and pipelines, oil and gas refineries, and industrial activities. FOF #29-32, 38-40, 43, 45-48, 50-51, 223-230, 232, 235-236, 262-265. These fossil fuel projects, which could not operate without undergoing MEPA review and obtaining authorization from Defendants, are responsible for globally significant GHG emissions. FOF #222. Despite enshrining the right to a clean and healthful environment in the Constitution over fifty years ago, Montana's GHG emissions have grown significantly since then. FOF #231.

Since 2011, the MEPA Limitation prohibited Defendant agencies from considering GHG emissions resulting from their permitting activities, or analyzing how those emissions exacerbate climate change and harm Montana's natural environment and children. FOF #34, 234, 243, 253-254. As a result of the MEPA Limitation, Defendant agencies were constrained from making fully informed permitting decisions about how a fossil fuel project would contribute to climate change, harm Montana's children, or be consistent with Montanans' fundamental constitutional rights. FOF #256, 259-261. Defendants' uninformed decision-making results in the unfettered, systematic approval of fossil fuel projects, the resultant GHG pollution, and Plaintiffs' injuries. FOF #193-194, 256, 261, 265-266.

The District Court concluded there was no barrier, except the MEPA Limitation, precluding Defendant agencies from considering GHG emissions and climate harms from fossil fuel projects in deciding whether to award permits or otherwise approve those projects; agencies analyzed such impacts prior to 2011, and as their own witnesses admitted, can do so now. FOF #252, 257. Because "[e]very ton of fossil fuel emissions contributes to global warming and impacts to the climate and thus increases the exposure of Youth Plaintiffs to harms now and additional harms in the future," all steps by Defendants to reduce GHG emissions will benefit Plaintiffs and Montana's environment. FOF #92. "There is scientific certainty that if fossil fuel emissions continue, the Earth will continue to warm." FOF #90.

Defendants neither presented evidence refuting the detailed harms to the Plaintiffs caused by the State's conduct, nor disputed Plaintiffs' evidence on the benefits or feasibility of a renewable energy transition in Montana. Based on uncontroverted testimony, the District Court found that it is technically and economically feasible for Montana to "replace 80% of existing fossil fuel energy by 2030 and 100% by no later than 2050, but as early as 2035." FOF #272. Transitioning to renewable energy, "will create jobs, reduce air pollution, and save lives and costs associated with air pollution," irrespective of climate change. FOF #271. Defendants offered zero evidence of a compelling interest in the perpetuation of the State's fossil fuel energy system or the MEPA Limitation's requirement that agencies ignore GHG emissions and climate harms when making permitting decisions.

While significant harm has already been inflicted to Montana's environment and to Plaintiffs, the testimony showed that reducing Montana's GHG emissions is necessary, and will assist in restoring Earth's energy balance,[4] which requires reducing the atmospheric concentration of CO_2 to no more than 350 ppm to avoid

[4] "The Earth's energy imbalance (the difference in energy from sun arriving at the Earth and the amount radiated back to space) is what climate scientists describe as the most critical metric for determining the amount of global heating and climate change we have already experienced and will experience as long as the Earth's energy imbalance exists." FOF #82, 83-92, 65.

the most long-lasting and irreversible impacts of climate change, and to protect the health, safety, and well-being of these youth Plaintiffs and other Montana children. FOF #82-85, 89-92, 139; SR-64. To act consistently with restoring Earth's energy balance, Defendants cannot continue their unfettered approval of more fossil fuel projects that ignore GHG pollution, climate harms, and Defendants' affirmative obligations to protect Plaintiffs' constitutional rights. FOF #98, 193-194, 256, 265.

STANDARDS OF REVIEW

This Court reviews a district court's findings of fact for whether they are clearly erroneous. *In re Est. of Kuralt*, 2000 MT 359, ¶14. A district court's findings of fact are clearly erroneous if they are not supported by substantial credible evidence, if the trial court misapprehended the effect of the evidence, or if a review of the record leaves this Court with the "definite and firm conviction that a mistake has been committed." *Id*. (citation omitted).

Issues of justiciability, including standing, are questions of law which this Court reviews de novo for correctness. *Reichert*, ¶20. This Court's review of questions of constitutional law is plenary, and the Court reviews district court decisions on constitutional issues de novo for correctness. *Id*. ¶19.

A district court's ruling on motions for medical examinations under M.R.Civ.P. 35(a) is reviewed for abuse of discretion. *Pumphrey v. Empire Lath & Plaster*, 2006 MT 99, ¶16.

SUMMARY OF THE ARGUMENT

Plaintiffs have more than met their burden to prove standing under Montana's jurisprudence, as demonstrated by the District Court's legal conclusions, which are based on an extensive evidentiary record and detailed findings of fact. That record proves youth Plaintiffs are experiencing justiciable injuries, which Defendants now concede. Plaintiffs are experiencing constitutional injuries, stemming from the violation of their constitutional rights, including climate injuries, caused by GHG pollution and the attendant climate harms. The MEPA Limitation causes Plaintiffs' constitutional injuries because it prevents state agencies from analyzing information necessary to make fully informed and constitutionally compliant permitting decisions, including decisions to deny or condition fossil fuel permits. The MEPA Limitation causes and contributes to Plaintiffs' climate injuries because, as the uncontested evidentiary record before the District Court proved, Defendants' uninformed and unfettered permitting of fossil fuel projects has caused an increase in Montana's GHG emissions, which is degrading Montana's environment and natural resources, and harming Plaintiffs' health, safety, dignity, and security. Defendants presented no admissible evidence to contradict the District Court's factual findings that Montana's GHG emissions, authorized after MEPA review, are significant and contribute to Plaintiffs' injuries.

Declaring the MEPA Limitation unconstitutional, alone, redresses Plaintiffs' constitutional injuries as it removes the legislative barrier to Defendants making fully informed, constitutionally compliant permitting decisions, including Defendants' ability to condition or deny fossil fuel permits based on their harm to the environment and children's health and safety. Additionally, such a declaration alleviates Plaintiffs' injuries by providing Defendants with the information needed to deny or require modifications to permits for fossil fuel projects, thereby effectuating a reduction in Montana's GHG emissions and contributions to climate change. Because the District Court found there is already an unconstitutional level of GHGs in the atmosphere, and every ton of GHG emissions exacerbates Plaintiffs' injuries, a reduction in Montana's GHG emissions will alleviate Plaintiffs' injuries.

Defendants attempt to foreclose Plaintiffs' right to obtain redress through the courts for the infringement of their constitutional rights and ongoing climate injuries, arguing Montana's courts lack authority to grant *any* relief that would alleviate Plaintiffs' injuries. Defendants' causation and redressability arguments, if accepted, would immunize all of MEPA from judicial review, contradict the evidentiary record, and establish new precedent that, even where undisputed trial testimony *proves* GHG emissions from Montana are locally, nationally, and globally significant, such emissions cannot contribute to actionable climate injuries. Defendants do not establish that *any* of the District Court's factual findings

underlying the legal conclusions were clearly erroneous, nor do Defendants cite *a single Montana case* that has been dismissed for failing to establish causation or redressability.

The State also seeks to exempt all of MEPA from review for constitutional compliance, even though this Court has already made clear MEPA serves to "bring the Montana Constitution's lofty goals into reality . . . ." *Park Cnty. Env't Council v. DEQ*, 2020 MT 303, ¶70. Contrary to the State's unsubstantiated claims, this case is not about the impacts of climate change writ large, but rather about how *Montana's* environment and natural resources, and *Montana's* children and youth, are being harmed by Defendants' actions that cause and contribute to climate harms *within Montana.* Upon review of the factual record, there can be no doubt that the MEPA Limitation and Judicial Prohibition implicate Plaintiffs' right to a clean and healthful environment. Because there is no evidence of any compelling state interest in ignoring GHG pollution and climate change during environmental reviews, the District Court correctly concluded the statutes fail strict scrutiny and are unconstitutional. Accepting any of the State's (or their amici's) belated factual or constitutional arguments would eviscerate the purpose of MEPA, young Montanans' rights to a clean and healthful environment today and well into the future, and the very idea of an independent judiciary that reviews government laws for

constitutional compliance and defers to the District Court's factual findings but for clear error.

Finally, the District Court did not abuse its discretion in denying Defendants' Rule 35(a) motion for psychological exams because this is not a tort case seeking monetary damages for emotional distress and, therefore, Plaintiffs' mental health is not genuinely in controversy. Defendants also failed to carry their heavy burden to establish good cause for such an intrusive form of discovery.

ARGUMENT

I. PLAINTIFFS HAVE PROVEN CASE-OR-CONTROVERSY STANDING

To establish case-or-controversy standing, plaintiffs must allege a past, present, or threatened injury that would be alleviated by successfully maintaining the action. *Schoof v. Nesbit*, 2014 MT 6, ¶15; *MEIC v. DEQ*, 1999 MT 248, ¶41. A plaintiff's standing may arise from an alleged violation of a constitutional right. *Schoof*, ¶23; *Weems v. State*, 2019 MT 98, ¶9. Plaintiffs must have a "personal stake" in the outcome of the controversy. *Schoof*, ¶15. While federal standing cases are "persuasive authority," *Heffernan v. Missoula City Council*, 2011 MT 91, ¶30 n.3, Montana courts perform their own independent standing analysis that does not strictly follow federal jurisprudence, thereby leaving "the courthouse doors open a little wider to litigants in Montana." Anthony Johnstone, *The Montana Constitution in the State Constitutional Tradition*, 234 (2022).

In denying Defendants' motion for summary judgment, which raised standing, the District Court found there were "factual disputes" regarding Plaintiffs' standing that needed to be resolved at trial. Doc. 379 at 13-14; *see also Barhaugh v. State*, No. OP 11-0258, at 2 (Mont. June 15, 2011) (There are numerous factual disputes, not "purely legal questions," about Montana's actions that contribute to climate change that need to be resolved before a trial court.). The extensive trial testimony and exhibits formed the basis for the District Court's detailed factual findings, which underpin its legal conclusion that Plaintiffs have standing. Defendants presented no credible evidence at trial to dispute Plaintiffs' standing, and here, present no evidence or argument that any of the District Court's findings of fact were clearly erroneous. *Seltzer v. Morton*, 2007 MT 62, ¶152 (deferring to district court's findings of fact after trial); *Duke Power Co. v Carolina Env't Study Grp., Inc.*, 438 U.S. 59, 77 (1978) (Supreme Court is "bound to accept" district court's factual findings regarding standing after four-day evidentiary hearing, because they were not clearly erroneous.). The District Court's holding that Plaintiffs proved standing is supported by a robust trial record, detailed findings of fact, and is consistent with Montana's jurisprudence.

A. Plaintiffs' Constitutional Injuries Are Justiciable

i. Defendants Concede Plaintiffs Are Experiencing Justiciable Injuries Caused by GHG Pollution and Climate Change

Plaintiffs have standing for their personal injuries caused by GHG pollution and climate change. Defendants now concede Plaintiffs are experiencing cognizable injuries to their physical health resulting from climate change, Agency Br. 12, State Br. 4, caused by extreme heat, drought, wildfire smoke, and air pollution in Montana. FOF #108; *MEIC*, ¶45; LB-27; *Missoula City-Cnty. Air Pollution Control Bd. v. BER*, 282 Mont. 255, 262 (1997). Exposure to wildfire smoke in Montana, for example, is increasingly prevalent due to an extended wildfire season, FOF #183-185, SR-54, and is particularly harmful to Plaintiffs Olivia, Mica, Ruby, Jeffrey, and Nathaniel, who have pre-existing respiratory conditions, including asthma. FOF #201(a), 205(f), 206(a)-(b), 207(j); *see also* FOF #122-125, 127-128. Extreme heat and a prolonged allergy season due to climate change in Montana also harm Plaintiffs' physical health, making it harder for them to work and recreate outdoors. FOF #126, 131, 195(g), 196(i), 199(d), 201(b).

Defendants also concede Plaintiffs are experiencing climate-related economic injuries, Agency Br. 13, which include declining profits from Rikki's family ranch and motel business, and for Sariel, Taleah, and Claire, lost income due to wildfires, drought, and declining snowpack disrupting their ability to work. FOF #130, 195(f), (h)-(j), (o), 197(h), 202(a), 203(b); *Larson v. State*, 2019 MT 28, ¶47; *Helena Parents Comm'n v. Lewis & Clark Cnty. Comm'rs*, 277 Mont. 367, 372 (1996).

Plaintiffs' undisputed trial testimony established they are experiencing additional harms, including injuries to their property, cultural and spiritual practices, recreational and aesthetic interests, and mental health. For example, Plaintiffs Rikki, Lander, Badge, Eva, Kian, Claire, and Taleah have experienced harms to their homes and property interests, including water rights, due to climate-induced flooding, wildfires, and droughts. FOF #130, 195(f), (m), 196(h), 198(a), 202(e), (f), 203(a), 204(d)-(e); *Heffernan*, ¶33. For Sariel, a member of the Confederated Salish and Kootenai Tribes, declining snowpack and increasing drought reduced her ability to partake in cultural and spiritual activities, including telling snow-dependent creation stories, gathering native plants used in traditional medicines, and picking huckleberries. FOF #109(b), 132, 197(d)-(g), (j); SS-16. For Ruby and Lilian, members of the Crow Nation, extreme heat and wildfire smoke diminish their ability to participate in cultural activities at Crow Fair and limit their opportunity to pick culturally important chokecherries. FOF #132, 207(a)-(f), (h)-(i); *see also* FOF #197(g); *Chilkat Indian Vill. of Klukwan v. Bureau of Land Mgmt.*, 399 F. Supp. 3d 888, 904 (D. Alaska 2019).

Plaintiffs are also suffering cognizable recreational and aesthetic injuries. *Park Cnty.*, ¶¶21-22; *MEIC*, ¶45; *Mont. Trout Unlimited v. Beaverhead Water Co.*, 2011 MT 151, ¶¶27-33. Lander, Badge, and Kian's ability to hunt and fish—which are important family and cultural activities and a key means to provide food for their

families—has been inhibited due to extreme heat, wildfire smoke, low instream flows, and water temperatures too warm for fish. FOF #196(c)-(f), 198(c); *see also* FOF #199(e), 200(a)-(b), 204(g), (i), 207(l) (Georgi, Eva, Grace, Ruby, and Lilian's access to Montana's rivers limited or completely foreclosed due to climate impacts). Plaintiffs' trial testimony demonstrated that their lives are deeply intertwined and connected with Montana's natural environment, and that climate impacts are destroying and degrading places of deep cultural, familial, and personal significance to Plaintiffs, causing them to experience a "loss of ties to the land." FOF #196(o); *see also* FOF #196(k) (wildfires have destroyed and degraded parts of Badger-Two Medicine, which Badge was named after); FOF #202(g) & Tr. 892:10-893:19 (Claire relies on Montana's outdoors for physical therapy); FOF #197(d)-(e) (gathering sweetgrass and bear root is culturally and spiritually important to Sariel).

Additionally, Plaintiffs experience distinct psychological harms related to their climate injuries, as Defendants concede. Agency Br. 12; State Br. 4; *Gryczan v. State*, 283 Mont. 433, 446 (1997). Living through extreme weather events, witnessing the destruction of Montana's environment and natural ecosystems, preparing to evacuate their homes, being forced to seek refuge indoors to avoid smoke-filled skies, and losing cultural and familial traditions and practices are traumatic for Rikki, Lander, Badge, Sariel, Georgi, Grace, Olivia, Claire, and Mica, and cause them to experience feelings of despair, depression, and stress, making it

hard to sleep at times. FOF #195(n), 196(h), (n), 197(k), 199(b), 200(f)-(g), 201(c), 202(b), (h), 205(b), (i); *see also* FOF #109(a)-(e), 113-117, 129; MK-15. For Olivia, her "climate anxiety is like an elephant sitting on her chest and it feels like a crushing weight." FOF #201(e); *see also* FOF #134-135, 200(g) (Grace questions whether she can morally have children if climate change is not addressed).

Significantly, Plaintiffs, as children and youth, are at a "critical development stage in life"; their developing minds and bodies render them "uniquely vulnerable" to climate injuries. FOF #104, 105, 107. Given this vulnerability and their average longevity, "Plaintiffs face lifelong hardships resulting from climate change." FOF #133; LB-20. While Plaintiffs are already experiencing concrete injuries, the District Court correctly concluded, *based on uncontroverted evidence*, that "[e]very additional ton of GHG emissions exacerbates Plaintiffs' injuries and risks locking in irreversible climate injuries." COL #6; FOF #91-92, 98.[5] So long as Defendants continue to approve all permit applications for fossil fuels projects without considering GHG pollution and climate impacts, Plaintiffs will experience ongoing and worsening injuries. FOF #194, 259-261, 268; LB-32; *see also* COL #6-7, 10, 16. The unique vulnerability of Plaintiffs, the gravity of the injuries they are already

[5] While the State claims there is "[n]o credible evidence" for this finding, State Br. 10, the evidence is in the trial record, and was uncontested by Defendants. Tr. 188:3-11, 279:14-20, 314:17-315:1, 318:2-5, 358:1-7, 951:25-953:5, 957:20-958:12, 975:2-11; PE-40; P143 at P-0047992-98 (admitted Doc. 390).

experiencing, and the inevitability of more severe climate injuries in the future absent prompt remedial action, underscore Plaintiffs' personal stake in this matter and the need for judicial redress. *Schoof*, ¶15.

ii. Plaintiffs Also Have Standing to Prevent Further Infringement of Their Constitutional Rights

Plaintiffs also have standing to prevent further infringement of their fundamental constitutional rights, including their right to a clean and healthful environment. When injuries are premised on the violation of constitutional rights, "standing depends on whether the constitutional . . . provision . . . can be understood as granting persons in the plaintiff's position a right to judicial relief." *Schoof,* ¶21 (quotation marks and citation omitted); *Shockley v. Cascade Cnty.*, 2014 MT 281, ¶22. Here, as in *Schoof,* the implicated constitutional provisions are directed to the citizen. *Schoof*, ¶21; Mont. Const. art. II, §3 ("All persons"); *id.* art. IX, §1(1) ("present and future generations"); *id*. art. II, §15 ("persons under 18"). The Constitutional Convention records confirm that the standing requirements for citizens seeking to protect their right to a clean and healthful environment were intended to be liberally construed. *MEIC,* ¶66; *see also Schoof,* ¶24 (looking to Constitutional Convention history). Notably, the Framers clearly avowed citizens must have standing to sue to protect their rights even *before* any environmental harm or degradation has occurred. *See, e.g.*, Const. Con. Vol. 5 at 1229-30 (Delegate Robinson explaining how citizens must have standing to sue to protect themselves

and the environment, even before actual damages occur); *id.* at 1232 (Delegate Robinson, same); *id.* at 1231 (Delegate Speer noting that without being able to sue "there is no guarantee that . . . a good environment is to be preserved.").

Plaintiffs, including children under eighteen, are unmistakably among the citizens the Framers intended to have standing to sue to protect their right to a clean and healthful environment, even for harms that have yet to occur. *Park Cnty.*, ¶¶62, 64; *MEIC*, ¶77; *Schoof*, ¶¶21-23; *Shockley*, ¶22. The MEPA Limitation and Judicial Prohibition unconstitutionally thwart Defendants' ability to fulfill their affirmative duty to maintain and improve a clean and healthful environment for present and future generations and to provide adequate remedies for the protection of Montana's environmental life support system. *See infra* I.B and II. Accordingly, Plaintiffs are experiencing cognizable current and threatened constitutional injuries. *Schoof*, ¶21; *Advocs. for Sch. Tr. Lands v. State*, 2022 MT 46, ¶28.

B. Defendants Are a Cause of Plaintiffs' Constitutional Injuries[6]

While causation is not an explicit element of Montana's standing test, which focuses on plaintiffs' injuries, and whether they can be alleviated, the District Court found causation is implicit because case-or-controversy standing derives from

[6] While the State purports to dispute causation, it does not argue any of the findings of fact related to causation were clearly erroneous or articulate any rationale for why the District Court's legal holding was incorrect. State Br. 10-12 (citing cases for the causation standard but not identifying any errors the District Court made).

Article VII, Section 4(1) of the Montana Constitution, similar to Article III, Section 2 of the United States Constitution. Doc. 46 at 8 (citing *Bullock v. Fox*, 2019 MT 50, ¶30). A uniform causation standard has never been articulated by Montana's courts. *Compare Heffernan*, ¶32 (referring to "fairly traceable" standard) to *Larson*, ¶46 (plaintiff has standing if alleged wrong or illegality has "in fact caused, or is likely to cause," the plaintiff to suffer an injury). While recognizing federal jurisprudence as persuasive, this Court has never required the exacting causation requirements Defendants seek to import from federal cases. *Heffernan*, ¶30 n.3. Indeed, Defendants *do not cite a single Montana case* that has been dismissed for lack of causation (or redressability), nor are Plaintiffs aware of any.

The District Court required Plaintiffs to prove causation, holding Plaintiffs to the high "fairly traceable" standard,[7] and also using "caused" and analogous phrases throughout its final order. *See, e.g.*, FOF #109, 119, 191, 195(l), 203(a), 205(i), 206(a), 207(c), 265, 267-268, 270, COL #13, 16; *see also* FOF #200(a), 202(a), 203(a), 204(b), 253, 265(l) ("because of"); FOF #193, 218, 265, COL #10, 50 ("due to"); FOF #34, 194, 255, 260, 265(b)-(f), (h)-(k), COL #13 ("pursuant to"). The District Court appropriately did not require Plaintiffs to meet a tort-causation

[7] Below, Defendants argued for the "fairly traceable" standard. Doc. 12 at 7; Doc. 17 at 6; Doc. 290 at 3, 5; Doc. 332 at 5-6; Defs.' Proposed FOF/COL at 25, 37-38.

standard. Doc. 379 at 11-12; *Hall v. Norton*, 266 F.3d 969, 977 (9th Cir. 2001) (A plaintiff "need not establish causation with the degree of certainty that would be required for him to succeed on the merits, say, of a tort claim."); *see also NRDC v. Watkins*, 954 F.2d 974, 980 n.7 (4th Cir. 1992) ("fairly traceable" standard is "not equivalent to a requirement of tort causation"); *PIRG v. Powell Duffryn Terminals*, 913 F.2d 64, 72 (3d Cir. 1990) (same) (citing *Duke Power Co.*, 438 U.S. at 78). The District Court correctly weighed the evidence and issued detailed findings of fact to support its conclusion that Plaintiffs satisfied their burden to show causation, meeting, if not exceeding, the burden required under Montana's jurisprudence.[8] *Prindel v. Ravalli Cnty.*, 2006 MT 62, ¶46 (causation "should be resolved by the trier of fact"); *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 345-47 (2d Cir. 2009) (causation is a fact-intensive issue "best left to the rigors of evidentiary proof"), *rev'd on other grounds*, 564 U.S. 410 (2011).

i. The MEPA Limitation and Defendants' Resulting Uninformed and Unfettered Permitting Decisions Cause Plaintiffs' Injuries

Defendants do not dispute they control Montana's energy system. FOF #26, 29 (citing Defs' Answer); FOF #38-40, 43, 45, 47 (citing Doc. 384, Agreed Facts).

[8] Defendants take issue with the length of the District Court's causation holding in the final order, Agency Br. 17, but ignore that its legal conclusions are based on extensive findings of fact and supported by pre-trial orders. Doc. 46 at 7-19; Doc. 379 at 9-14.

Defendants issue air quality permits for facilities that burn fossil fuels and emit GHG emissions, including coal and gas-fired power plants, and oil and gas refineries. FOF #29, 50, 235, 265(a), (g), (i)-(k). Defendants permit coal, oil, and gas mining and extraction on state, private, and federal land. FOF #32, 38-39, 51, 223, 225, 265(b)-(f), (h), (l). Defendants also certify and approve pipelines to transport oil and gas. FOF #31, 40, 265(k). Defendants agree their permitting and authorization of the "extraction, transportation, and consumption of fossil fuels results in GHG emissions." FOF #49 (citing Doc. 384, Agreed Facts); *see also* FOF #48, 68-69, 212-213. Prior to issuing any of these permits, Defendants are required to conduct environmental reviews pursuant to MEPA. FOF #30; *see also* §75-1-201(1), MCA; Tr. 793:17-18 (fossil fuel projects cannot be approved without MEPA review). Defendants do not dispute any of these factual findings by the District Court.

Nor do Defendants dispute they have known the dangers of GHG pollution and climate change for at least thirty years, FOF #244-251,[9] and that prior to 2011, Defendants analyzed such impacts in conducting environmental reviews pursuant to MEPA. FOF #252. Defendants acknowledge they stopped analyzing GHG pollution and climate impacts in their environmental reviews when the MEPA Limitation was adopted in 2011 and continued to ignore such harms under the 2023 MEPA

[9] *See also* P6, P36 (admitted Doc. 391); P2, P17, P28 (admitted Doc. 393).

Limitation. FOF #34, 243, 253. As a direct result of the MEPA Limitation, Defendant agencies would issue permits to coal- and gas-fired power plants, coal mine operations, oil and gas extraction, oil and gas pipelines, petroleum refineries, and other facilities that transport and burn fossil fuels turning a blind eye to GHG pollution and known climate harms in Montana. FOF #234, 262-264, 265(k)-(l). DEQ witnesses readily admitted at trial that they could not consider GHG emissions or climate change during environmental reviews, first because of the 2011 MEPA Limitation, and then because of the 2023 MEPA Limitation. Tr. 1361:6-9, 1312:18-1313:4, 1314:6-15, 1322:21-1323:2, 1323:21-24.

The District Court's findings of fact, supported by an extensive trial record, illustrate the many ways in which GHG pollution and climate change are damaging and degrading Montana's constitutionally protected environment and natural resources, and harming the health and welfare of Montanans, including Plaintiffs. FOF #142-143 (describing Montana's long-term warming trend); FOF #145-147 (Montana's snowpack is decreasing); FOF #148-150 (increase in spring-time flooding in Montana); FOF #154-159, DF-15 (loss of glaciers in Glacier National Park); FOF #159, 170-171 (water levels in Montana's rivers and lakes routinely below normal levels; water temperatures well above historical levels); FOF #173-174 (low water levels and warm temperatures in rivers and lakes are harmful to fish and other aquatic organisms); FOF #177-182 (droughts in Montana are now more

expansive, leading to tree mortality, degrading forest health, impacting aquifers and water systems, and leading to pest infestations and more frequent and severe wildfires); FOF #183 (wildfire season in Montana is two months longer now compared to 1980s); FOF #186-187 (rising temperatures and drought pose challenge for farmers and wildlife); FOF #194-207 (describing climate injuries to Plaintiffs). However, because of the legislatively-imposed MEPA Limitation, Defendants could not consider these harms or deny permits for fossil fuel projects under MEPA review for climate change reasons, even though Montana's fossil fuel activities are causing and contributing to Plaintiffs' injuries in Montana. FOF #233-234.

The purpose of MEPA is to ensure the Legislature and state agencies fulfill their *constitutional obligation* to prevent degradation and depletion of Montana's clean and healthful environment by ensuring fully informed decision-making. *Park Cnty.*, ¶67; §75-1-102(1), MCA. MEPA requires government agencies to look before they leap when exercising their statutory authorities for projects that may have an impact on the environment. *Mont. Wildlife Fed'n v. BOGC*, 2012 MT 128, ¶32; §75-1-201(1)(b)(i)(A), MCA; *Park Cnty.*, ¶65. While Defendants attempt to eviscerate the purpose of MEPA, arguing it is a procedural statute, Agency Br. 14, State Br. 13, this Court has already clarified that "'[p]rocedural,' of course, does not mean 'unimportant,'" explaining:

> The Montana Constitution guarantees that certain environmental harms shall be prevented, and prevention depends on forethought. *MEPA's*

> *procedural mechanisms help bring the Montana Constitution's lofty goals into reality by enabling fully informed and considered decision making, thereby minimizing the risk of irreversible mistakes depriving Montanans of a clean and healthful environment.*

Park Cnty., ¶70 (emphasis added).

Based on the evidence presented, the District Court found: "Defendants' application of the MEPA Limitation during environmental review of fossil fuel and GHG-emitting projects, prevents the availability of vital information that would allow Defendants to comply with the Montana Constitution and prevent the infringement of Plaintiffs' rights." FOF #259. If Defendants were correct that MEPA cannot cause any harm simply because it is a procedural statute, all of MEPA would be immunized from judicial review and the plaintiffs in *Park County* would not have had standing to challenge a separate provision of MEPA. *Park Cnty.*, ¶22; *Heffernan*, ¶33. The risk of uninformed, constitutionally deficient agency decision-making, *caused by the MEPA Limitation*, establishes causation given the preventative nature of Montana's constitutional environmental protections. *See, e.g.*, *MEIC*, ¶¶45, 77; *see also Gryczan,* 283 Mont. at 443-46 (standing to challenge statute that had not been enforced in decades); *Schoof*, ¶¶12-23 (standing to challenge county fiscal decisions before financial injuries occurred); *accord Lee v. State*, 195 Mont. 1, 7 (1981).

ii. The MEPA Limitation Causes and Contributes to Plaintiffs' Climate Injuries

a. The MEPA Limitation, and Defendants' Resulting Uninformed and Unfettered Permitting Decisions, Contribute to an Increase in Montana's GHG Emissions

While the established *risk* of uninformed decision-making is sufficient for standing, here, the evidence shows Defendants *have* been making uninformed permitting decisions for fossil fuel projects since 2011 because of the MEPA Limitation in a manner that harms the Plaintiffs. FOF #34, 253-256, 259-265. Those uninformed decisions continued under the 2023 MEPA Limitation. Doc. 424, Ex. A at 2 (DEQ refusing to analyze GHG emissions and climate harms pursuant to 2023 MEPA Limitation).[10] Plaintiffs' policy expert, Ms. Anne Hedges, testified that Defendant agencies consistently approve *every* permit application they receive for fossil fuels projects, thereby increasing Montana's GHG emissions. Tr. 831:22-832:1. Defendants did not refute this testimony. Tr. 1382:22-1383:19 (Ms. Nowakowski explaining how DEQ works with fossil fuel companies to cure permit defects, but not disputing that permits are ultimately approved, sometimes with modifications). Considering the expert testimony before it, the District Court found Montana's GHG emissions "are increased by Defendants' actions to permit and approve fossil fuel activities with no environmental review of their impact on GHG

[10] The plain language of the 2023 MEPA Limitation, and Defendants' interpretation of it, are already clear; accordingly, Defendants need no further "opportunity" to continue applying an unconstitutional law. Agency Br. 19 n.6.

levels in the atmosphere and climate change." FOF #266; *see also* FOF #256, 261-265, 267; Tr. 836:2-846:24 (Ms. Hedges explaining that since 2011 fossil fuel projects are approved by Defendants without consideration of GHG pollution, causing significant GHG emissions). Accordingly, Defendants' assertion that Montana's GHG emissions are not "tied" to the MEPA Limitation, Agency Br. 24-25, is unsupported by the findings of fact or trial record.

While other substantive permitting statutes provide agencies discretionary authority for final permitting decisions, MEPA reviews are legally required and provide agencies with critical information used in considering whether a permit application complies with substantive statutes and Montana's Constitution, and whether the permit application should ultimately be approved, modified, or denied. *Park Cnty*., ¶¶56, 69, 89. Rejecting the same argument Defendants make here, this Court explained in *Park County* that the presence of a "host of other substantive environmental laws" does not make MEPA redundant as "MEPA is *unique* in its ability to avert potential environmental harms through informed decision making." *Id*. ¶¶75-76 (emphasis added). Indeed, Defendants' witness admitted at trial that MEPA and substantive regulatory statutes are interrelated, and MEPA "can feed into" regulatory actions. Tr. 1385:16-1386:9. As Ms. Nowakowski, DEQ Division Administrator for Air, Energy, & Mining, explained, if a MEPA review revealed that issuing a permit for a coal mine would cause material damage to cultural resources

in a manner inconsistent with the substantive permitting statute, then DEQ could reject the permit. Tr. 1386:4-14. Ms. Hedges explained that MEPA is a "companion to the permitting statutes" and there is a "very strong nexus" between the two. Tr. 820:23-821:11, 821:14-15. Thus, even though fossil fuel projects are approved under the statutory discretion of the Defendant agencies, the unconstitutional MEPA Limitation guaranteed Defendant agencies would *not be able to make fully informed decisions* pursuant to substantive permitting statutes and was, therefore, the *cause of Defendants' uninformed* fossil fuel permitting decisions. This is true even if there are multiple steps in the causation chain. *Bennett v. Spear*, 520 U.S. 154, 168-69 (1997) (rejected notion that the challenged conduct must be the "last step in the chain of causation"); *see also Skyline Wesleyan Church v. Cal. Dep't of Managed Health Care*, 968 F.3d 738, 748 (9th Cir. 2020) (finding "a direct chain of causation" even when there were multiple links in causation chain); *accord Mendia v. Garcia*, 768 F.3d 1009, 1012 (9th Cir. 2014).

b. *Bitterrooters* Confirms Defendants Have Control Over Montana's Fossil Fuel Activities that Cause GHG Emissions and Climate Harms

Contrary to Defendants' arguments, *Bitterrooters for Planning, Inc. v. DEQ* affirms Defendants are a cause of Montana's GHG emissions and ensuing climate harms, which stem from their uninformed permitting decisions. 2017 MT 222. *Bitterrooters* confirmed MEPA reviews are required to assess impacts that have a

"reasonably close causal relationship between the subject government action and the . . . environmental effect." *Id.* ¶¶25, 33 (quotation and citation omitted). *Bitterrooters* did not sever the causal connection between Defendants' issuance of permits for fossil fuel activities (which could not operate lawfully absent such state-issued authorizations), and all foreseeable impacts from such authorizations, including emissions of GHGs and attendant climate impacts. FOF #48-49.

In *Bitterrooters*, this Court held DEQ's MEPA review for a wastewater discharge permit for a "big box" retail store need not consider the broader environmental impacts of the construction and operation of the store (such as light and noise pollution, traffic impacts, and effects on property values and local businesses) because the permitted discharge and related construction of the wastewater treatment system were "not the causes-in-fact of the larger construction and operation" of the store. *Bitterrooters*, ¶25. DEQ's decision to issue the wastewater discharge permit was not the legal cause of such secondary impacts because DEQ could not prevent them through the lawful exercise of its independent authority, as the general land use control decisions to allow for the big box retail store were made by the local government bodies—not DEQ. *Id.* ¶¶33-34. DEQ's role was to decide whether to issue a wastewater permit for the retail store.

Here, by contrast, the air pollution and climate change impacts that are the cause of Plaintiffs' injuries are *directly* tied to the GHG emissions that result from

Defendants' permitting and authorizing fossil fuel activities—which could not occur without agency-issued permits or authorizations. FOF #29, 31-33, 39-40; *see also Sierra Club v. FERC*, 867 F.3d 1357, 1373 (D.C. Cir. 2017) (because agency can deny fossil fuel projects after NEPA review, it is a "legally relevant cause" of the GHG emissions and environmental effects). The permitting activities at issue here are clearly not "beyond the reach of MEPA," *Bitterrooters*, ¶34, as the trial record confirms that, since 2011, Defendants have conducted MEPA reviews for their authorizations *of fossil fuel activities*; but they have *ignored GHGs and climate change when doing so*. FOF #265(b)-(f), (h)-(l). Montana's substantive permitting statutes undeniably vest Defendants with control over permitting for fossil fuel activities—indeed, Defendants are the *only* entities with authority to prevent the harms revealed in a MEPA analysis of climate change impacts, by conditioning or declining to permit activities that result in unconstitutional levels of GHG emissions.[11]

c. The GHG Emissions Resulting from Defendants' Uninformed and Unfettered Permitting Decisions Are Locally, Nationally, and Globally Significant, Causing and Contributing to Plaintiffs' Climate Injuries

[11] As the District Court observed, when Defendants' MEPA analyses show proposed fossil fuel activities would result in degradation and harms in violation of the Montana Constitution, Defendants have authority under permitting statutes to bring permitting decisions into compliance with the Montana Constitution. COL #14, 23.

Defendants' past and ongoing permitting of fossil fuel activities, without consideration of GHG pollution and climate harms, has resulted in significant GHG emissions, harming Plaintiffs. FOF #233, 236. Contrary to Defendants' unsubstantiated argument that Montana's GHG emissions are "miniscule," State Br. 15, the undisputed evidence in the trial record shows Defendants are responsible for locally, nationally, and globally significant GHG emissions. FOF #222; COL #16. The District Court found, based on uncontroverted trial testimony, that Montana's fossil fuel-based economy is responsible for *at least* 166 million tons of CO_2 emissions *annually*, a conservative estimate that does not include methane emissions. FOF #218; PE-17, PE-18. Montana's annual CO_2 emissions are comparable to CO_2 emissions from Argentina (47 million residents), the Netherlands (18 million residents), or Pakistan (248 million residents). FOF #219; PE-22. Defendants' belated effort to discredit these factual findings, without any scientific evidence, fails to establish they are clearly erroneous.[12] Agency Br. 22; State Br. 15; *350 Montana v. Haaland*, 50 F.4th 1254, 1266 (9th Cir. 2022) (argument that GHG emissions from a single Montana mine expansion would be minor, without any scientific support, "is deeply troubling"). The trial record demonstrates Montana has

[12] Defendants never challenged Erickson's expert qualifications or methodology, which is also used by the federal government and IPCC. Tr. 915:22-916:7, 919:11-920:11; *see also* Tr. 906:21-907:14 (Erickson's scholarship on calculating CO_2 emissions has been cited approvingly by three federal courts).

control over all of these emissions through its regulatory authority. FOF #31, 40, 45, 47-48.[13]

Moreover, the District Court separately found Montana is responsible for 70 million tons of CO_2 emissions annually from fossil fuels Defendants have authorized to be extracted from Montana, which is more than many entire countries, including Brazil, Japan, Mexico, Spain, or the United Kingdom. FOF #215. These CO_2 emissions are attributable to Defendants, even if not all the fossil fuels extracted in Montana are ultimately burned here. FOF #32, 39. *350 Montana*, 50 F.4th at 1268 ("[A]ny meaningful measure of a local point source's contribution to global GHGs cannot exclude combustion-related emissions, regardless of where the coal is burned."). Even considering only the fossil fuels combusted within Montana, Defendants are responsible for 32 million tons of CO_2 emissions annually, which is more than the emissions from half the countries in the world. FOF #216; Tr. 951:1-10. Considering these numbers, it is clear, as the District Court found, that "Montana is a major emitter of GHG emissions in the world in absolute terms, in per person terms, and historically." FOF #222; *see also* FOF #237; Tr. 950:19-951:10 ("[I]f Montana is as big as over 100 countries, even by the most narrow definition of its emissions I can't make any other conclusion but that Montana's emissions are

[13] Erickson did not concede FERC has "predominate authority" over pipelines. Agency Br. 23; *see* Tr. 1002:13-22, 1003:16-23.

significant."); *contra* Agency Br. 33. Defendants had their chance to present evidence to dispute Plaintiffs' causation evidence at trial, but chose not to. Tr. 1082:19-1083:2 (declining to call expert Dr. Judith Curry).

Defendants' attempt to minimize Montana's GHG emissions compared to global emissions, State Br. 17, has no support in the factual record. This comparison approach has, moreover, consistently been rejected as a matter of law. *See, e.g.*, *350 Montana,* 50 F.4th at 1269-70 (relying on "opaque comparison" to global emissions hides the ball and frustrates purpose of NEPA); *WildEarth Guardians v. U.S. Bureau of Land Mgmt.*, 457 F. Supp. 3d 880, 894 (D. Mont. 2020). Additionally, this Court has previously held plaintiffs can have standing to challenge the constitutionality of a statute allowing the discharge of a known pollutant even when the pollutant was "close to nondetectable" once released into the environment. *MEIC*, ¶¶16, 21, 45; *see also* Tr. 110:4-21 (Dr. Running explaining that even small quantities of known pollutants are "not incidental").[14]

Defendants provide no legal authority to support their contention that the District Court should have quantified, with tort-causation-like specificity, how much Montana's GHG emissions have impacted global temperature or harmed Plaintiffs.

[14] *See also In re Hawai'i Elec. Light*, 526 P.3d 329, 355 (Haw. 2023) (GHG emissions from a single bioenergy plant "would produce massive carbon emissions" and violate right to a clean and healthful environment).

State Br. 9.[15] That level of specificity is not required to establish causation for standing, and it is well established that Defendants need not be the sole source of Plaintiffs' injuries to establish causation. *See, e.g.*, *Barnum Timber Co. v. EPA*, 633 F.3d 894, 901 (9th Cir. 2011) (plaintiffs need "not eliminate any other contributing causes to establish its standing"); *WildEarth Guardians v. U.S. Dep't of Agric.*, 795 F.3d 1148, 1157 (9th Cir. 2015) ("So long as a defendant is at least partially causing the alleged injury, a plaintiff may sue that defendant, even if the defendant is just one of multiple causes of the plaintiff's injury."); *NRDC*, 954 F.2d at 980 (To meet the "fairly traceable" requirement, a plaintiff "must merely show that a defendant discharges a pollutant that causes or contributes to the kinds of injuries alleged by the plaintiffs.") (quotation omitted).

What matters here are the GHG emissions that result from Defendants' uninformed permitting of fossil fuel projects, which cause and contribute to the climate crisis and Plaintiffs' climate injuries because every additional ton of CO_2 emissions permitted by Defendants worsens an already dangerous situation and makes recovery more difficult. FOF #85, 89-92, 98, 233 (Defendants authorize fossil

[15] While Dr. Fagre said he was not aware of any studies that "quantified" the effect of Montana's GHG emissions on glaciers in Glacier National Park, Tr. 440:16-23, he testified unequivocally that the decline of Montana's glaciers is caused by anthropogenic climate change, and that a reduction in Montana's GHG emissions is necessary to ensure the remaining glaciers are saved. *Compare* State Br. 16 *with* Tr. 409:9-410:4, 423:13-424:11, 428:1-12; FOF #160.

fuel activities "resulting in high levels of GHG emissions that contribute to climate change."); FOF #236 (Defendants' actions "generate GHG emissions, contribute to climate change, and harm Plaintiffs."); FOF #267 (same); FOF #90 ("There is scientific certainty that if fossil fuel emissions continue, the Earth will continue to warm."); *MEIC*, ¶79. Defendants do not dispute these factual findings, much less argue they are clearly erroneous.

The District Court's findings of fact and conclusions of law that the MEPA Limitation and Defendants' ensuing uninformed and unfettered permitting decisions cause and contribute to Plaintiffs' injuries rests on a fact-based inquiry that is itself based on the extensive (and unrebutted) expert testimony at trial. Defendants have no basis to argue clear error. This Court should reject Defendants' post-trial argument that Montana's GHG emissions do not cause and contribute to climate impacts in Montana and to Plaintiffs' specific injuries, which is unsupported by the evidence at trial, and affirm the District Court's well-supported conclusion that Plaintiffs met their burden to establish causation for their climate injuries.

iii. The 2023 MEPA Limitation Would Have Continued to Cause and Exacerbate Plaintiffs' Injuries

Defendants' argument that the 2023 version of the MEPA Limitation could not have been a cause of Plaintiffs' injuries, is a question of ripeness, which is a time dimension of standing. Agency Br. 13; State Br. 9; *Reichert*, ¶55. "Ripeness asks whether an injury that has not yet happened is sufficiently likely to happen or,

instead, is too contingent or remote to support present adjudication . . . ." *Id.* ¶55. The key considerations are "whether the issues presented are definite and concrete, not hypothetical or abstract" and "whether there is a factually adequate record upon which to base effective review." *Id.* ¶56 (quotation omitted).

Plaintiffs established that since 2011, Defendants have approved fossil fuel projects without considering GHG emissions and climate impacts pursuant to the MEPA Limitation, thereby violating Plaintiffs' constitutional rights and causing them cognizable injuries. The 2023 law (HB 971) merely clarified the 2011 MEPA Limitation and ensured the same unconstitutional conduct, which has already harmed Plaintiffs, would continue, thereby worsening Plaintiffs' injuries. FOF #90-92, 194, 268. The illusory distinction between the 2011 and 2023 versions of the MEPA Limitation was apparent to this Court in denying Defendants' Writ Application, explaining, "[s]ince the Complaint was filed, the theory of this claim has been that prohibiting consideration of the impacts of climate change in environmental review violates the Montana Constitution. The State does not explain how HB 971 changes that issue for trial." No. OP 23-0311, at 3-4 (Mont. June 6, 2023). Confirming Plaintiffs have standing to obtain a declaratory judgment as to the constitutionality of the 2023 MEPA Limitation, even before the full scope of Plaintiffs' *additional* injuries are realized, is consistent with the purpose of the Uniform Declaratory Judgments Act, which is to be remedial, *and* the *forward-*

looking constitutional right to a clean and healthful environment. *Larson,* ¶33; *MEIC*, ¶77.

Plaintiffs' pleading challenging the 2011 MEPA Limitation satisfies Montana's notice pleading standard with respect to the 2023 MEPA Limitation because HB 971 did not substantively alter the live controversy giving rise to Plaintiffs' claims. M.R.Civ.P. 8(a)(1), (e) (requiring "a short and plain statement of the claim showing that the pleader is entitled to relief" and that pleadings "*must be construed so as to do justice*.") (emphasis added); *Poeppel v. Flathead Cnty.*, 1999 MT 130, ¶17. HB 971's "clarifying" amendment to the MEPA Limitation did no more than make explicit what Plaintiffs had alleged all along with respect to the 2011 MEPA Limitation—that §75-1-201(2)(a), MCA, prohibits Montana's agencies from considering GHG emissions and climate change during environmental reviews. *See* Doc. 1, ¶¶108, 118 125, 190. The title of HB 971, plain language of the bill, and testimony of the bill's proponents all confirm that the 2023 MEPA Limitation was enacted only to clarify the meaning and intent of the 2011 version.[16] While

[16] Rep. Kassmier, the bill's sponsor, testified that "House Bill 971 sets the record straight. In 2011, the Legislature passed Senate Bill 233, and stated that MEPA could not include a review of impacts beyond Montana's borders. That meant the analysis did not include global climate change." Testimony begins at 16:10:00, http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/46608?agendaId=273490. Mr. Berry drafted the 2011 bill, SB 233, and testified: "I thought the [2011] language was pretty clear at the time. It excluded an evaluation of climate change or global warming." Testimony begins at 16:13:23, http://sg001-

Defendants claim they were not given adequate notice the District Court was adjudicating the 2023 MEPA Limitation, Agency Br. 2 n.2, that is contravened by the record. *See, e.g.*, Doc. 379 at 21-25; Doc. 384 at 17, 38. Additionally, Defendants neither objected during trial to testimony related to the 2023 MEPA Limitation, nor claimed they would be prejudiced by such evidence. This case has always been about whether it is constitutional for Defendant agencies to ignore GHG emissions and climate change during MEPA review and in approving permits, under the 2011 or the 2023 MEPA Limitation, as Defendants have known all along. Both versions of MEPA have caused and contributed to Plaintiffs' injuries.

C. A Favorable Ruling Will Alleviate Plaintiffs' Constitutional Injuries

Plaintiffs need only establish that their injuries would be "alleviated by successfully maintaining the action." *Schoof*, ¶15; *see also Larson*, ¶46. Plaintiffs are not required to show a "guarantee" that their injuries will be redressed, rather, plaintiffs need only show a likelihood the Court could provide meaningful relief. *Renee v. Duncan*, 686 F.3d 1002, 1013 (9th Cir. 2012) (citation omitted); *Friends of the Earth v. Laidlaw Env't Servs.*, 528 U.S. 167, 181 (2000). A plaintiff "need not show that a favorable decision will relieve his *every* injury," *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982), but only that it "would at least partially redress" the harm.

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harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/46608?agendaId=273490. *See* Doc. 382 at 2 n.8.

Meese v. Keene, 481 U.S. 465, 476 (1987). Based on the detailed factual record before it, the District Court correctly concluded: "Defendants can alleviate the harmful environmental effects of Montana's fossil fuel activities through the lawful exercise of their authority if they are allowed to consider GHG emissions and climate change during MEPA review . . . ." COL #18.

i. Declaratory Relief Alone Establishes Redressability for Plaintiffs' Injuries

Montana precedent is clear: declaratory relief as to the constitutionality of statutes, without more, establishes redressability and terminates constitutional controversies. *See, e.g.*, *MEIC*, ¶80 (standing established where plaintiffs sought declaratory judgment that a statute was unconstitutional); *Comm. for an Effective Judiciary v. State*, 209 Mont. 105, 110 (1984) (same); *Gryczan*, 283 Mont. 433 (declaratory judgment finding statute criminalizing same-sex conduct unconstitutional); *Lee*, 195 Mont. at 8-9 (declaratory judgment finding statute granting attorney general power to proclaim speed limit unconstitutional). In Montana, "[c]ourts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations *whether or not further relief is or could be claimed*." §27-8-201, MCA (emphasis added). As this Court explained: "Any party whose rights or status '*are affected* by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain

a declaration of rights, status, or other legal relations thereunder.'" *Larson*, ¶33 (emphasis in original) (quoting §27-8-202, MCA).[17]

a. Declaratory Relief Will Alter Defendants' Conduct, Clarifying that State Agencies Can, and Must, Evaluate GHG Emissions and Climate Impacts During Environmental Reviews

The record before the District Court confirms that declaring the MEPA Limitation unconstitutional will meaningfully influence Defendants' conduct. *Brown v. Jacobsen*, 590 F. Supp. 3d 1273, 1285 (D. Mont. 2022) (court has power to strike down unconstitutional laws and future government conduct must be consistent with court ruling); *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992) (it can be assumed that government officials will abide by an authoritative interpretation of the constitution). Relying in part on Defendants' own trial testimony, the District Court found: "If the MEPA Limitation is declared unconstitutional, state agencies will be capable of considering GHG emissions and the impacts of projects on climate change." FOF #257; *see also* FOF #214. Defendants' testimony and MEPA review documents illustrate that, prior to 2011, Defendants considered GHG emissions and climate impacts from fossil fuel

[17] Moreover, the U.S. Supreme Court specifically held nominal damages, "a form of declaratory relief in a legal system with no general declaratory judgment act," provides redress for purposes of Article III standing. *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 798 (2021) (citation omitted); *see also Utah v. Evans*, 536 U.S. 452, 463-64 (2002) (declaratory relief changes the legal status of the challenged conduct, sufficient for redressability).

projects. FOF #252 (citing examples of pre-2011 MEPA reviews that consider GHG pollution and climate); *accord* P225[18] at P-0018990-92 (admitted Doc. 393) (discussing climate science and impacts of climate change in Montana); *id.* at P-0019115 (quantifying annual GHG emissions from power plant); P232[19] at P-0042306-07 (admitted Doc. 393) (providing inventory of GHG emissions from project; includes direct and indirect emissions); *id.* at P-0042288. Indeed, not only did DEQ analyze GHG emissions *before* 2011, but both of DEQ's witnesses testified that DEQ *can* analyze GHG emissions *now*. Tr. 1321:22 (Mr. Dorrington testifying: "Could we look at CO_2 emissions? Yes."); Tr. 1437:4-8 (Ms. Nowakowski testifying that DEQ could do GHG emissions and climate impacts analysis absent the MEPA Limitation); *see also* Tr. 821:16-25 (Ms. Hedges testifying: "One hundred percent. State agencies absolutely have the skills and the information they need" to analyze GHG emissions and climate impacts of proposed fossil fuel projects).

Defendants' obligation to analyze GHG pollution and climate impacts in Montana under MEPA is consistent with the federal government's duties under the National Environmental Policy Act ("NEPA"). *Bitterrooters*, ¶18 (because MEPA is modeled on NEPA, federal authority construing NEPA is persuasive). NEPA

[18] Final Environmental Impact Statement for Highwood Generating Station.

[19] Draft Environmental Impact Statement for Roundup Power Project.

requires agencies to take a "hard look at environmental consequences" of proposed actions, which includes analyzing the GHG emissions and their contributions to climate change from a proposed project or rule, even when the fossil fuels are ultimately combusted in another state or country. *350 Montana*, 50 F.4th at 1265-66; *Ctr. for Biological Diversity v. NHTSA*, 538 F.3d 1172, 1216 (9th Cir. 2008) (finding EA inadequate for failing to evaluate impact of GHG emissions on climate change or the environment generally). Defendants claim, without citation, that nothing in MEPA allows agencies to consider GHG pollution and climate impacts within Montana, Agency Br. 21, but nowhere in MEPA is there a specific list of environmental impacts or pollutants to be considered in environmental reviews. Instead, MEPA uses expansive language requiring analysis of "impact[s] on the Montana human environment." §75-1-201(1)(b)(i)(A), MCA; *see also* §75-1-102(1)(a), MCA (MEPA requires that "environmental attributes are fully considered"). This expansive language makes sense given MEPA's role in protecting Montana's constitutionally protected natural resources and environment. §75-1-102, MCA.[20]

[20] This case is not about requiring Defendants to prevent out-of-state climate impacts. Agency Br. 21-22 (raising Dormant Commerce Clause arguments for the first time). Defendants' effort to recast this case as one seeking to control the conduct of parties outside of Montana is inconsistent with the District Court's Order, which focused on Defendants' conduct, the impacts of GHG pollution and climate change

As Defendants acknowledged, absent the MEPA Limitation, state agencies could consider the environmental impacts of GHG pollution and climate change when performing environmental reviews. Such an outcome stems not from "judicially created mandates," Agency Br. 38, but rather from removing the unconstitutional prohibition on such analysis. Upon completion of fully informed MEPA reviews that consider GHG pollution and climate harms, Defendants would have the information needed to conform their permitting decisions to the best science, the requirements of the permitting statutes, and Montana's Constitution. §75-1-102, MCA. Such relief will alleviate Plaintiffs' injuries, thereby establishing redressability. *Park Cnty.*, ¶22.

ii. Declaring the MEPA Limitation and Judicial Prohibition Unconstitutional, and Enjoining Their Implementation, Will Alleviate Plaintiffs' Climate Injuries

a. Constitutionally Compliant MEPA Reviews Will Enable Defendants to Deny or Require Modifications to Permits for Fossil Fuel Projects

Constitutionally compliant MEPA reviews will provide Defendants with information necessary to make fully informed permitting decisions that are consistent with Defendants' statutory and constitutional duties. Such informed decision-making will provide a basis for the denial or imposition of modifications to

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in Montana, and harm to Montana's children and youth. *See, e.g.*, FOF #19-52, 140-207.

permits for fossil fuel projects to prevent further degradation of Montana's environment and natural resources and harm to Montanans, including Plaintiffs. *Water for Flathead's Future, Inc. v. DEQ*, 2023 MT 86, ¶¶19-20; *id.* ¶22 (following MEPA review DEQ implemented additional pollution limits and safety requirements); *Park Cnty.*, ¶¶69, 76. The point is not that Defendants will deny or amend a fossil fuel permit *pursuant to MEPA*, Agency Br. 15, 20, but that the agency—based on a MEPA analysis that includes adequate consideration of a project's environmental and climate impacts—*can and must exercise its discretion under substantive permitting statutes* to deny or modify permits or other authorizations in order to adhere to its statutory and constitutional obligations.[21] *Park Cnty.*, ¶76; COL #18, 22; *see also* §75-2-211(9)(a), MCA (*after* MEPA review, DEQ shall notify applicant of approval or denial of the application); *see also Ctr. for Biological Diversity*, 538 F.3d at 1216 (NHSTA can change content of proposed rules "based on information contained in an EIS.").

[21] Defendants have ample discretion to deny permits under substantive permitting statues. *See, e.g.*, §§75-2-203 to -204, MCA (discretion under Clean Air Act of Montana to prohibit equipment and facilities that cause air pollution); §75-2-218(2), MCA (DEQ has discretion to deny air quality permits); §75-20-301, MCA (DEQ can only approve permits for facilities after considering numerous discretionary factors, including environmental impacts and public health, welfare, and safety); §77-3-301, MCA (state lands "may" be leased for coal if "in the best interests of the state"); §77-3-401, MCA (state lands "may" be leased for oil and gas if consistent with the Constitution); §82-4-227, MCA (DEQ has wide discretion to refuse mining permits).

Defendants take the untenable position that, even if the MEPA Limitation were declared unconstitutional, they would continue to approve all fossil fuels projects pursuant to the permitting statutes because they lack explicit authority to regulate GHG emissions or climate impacts and because the statutes *require* Defendants to approve all permits for fossil fuel projects. State Br. 12; Agency Br. 18. But this argument—in addition to depriving MEPA of its core purpose and disregarding Defendants' affirmative duty to protect Montana's clean and healthful environment—fails to recognize MEPA's unique role in informing permitting decisions, and the fact that Defendants' authority is defined by statutory law as well as Montana's Constitution. Tr. 1308:6-12 (Mr. Dorrington admitting DEQ must comply with the Constitution); Tr. 1330:2-4 (Mr. Dorrington testifying the Constitution "is the underpinning" of DEQ's work); Tr. 1430:19-1431:7 (Ms. Nowakowski testifying that DEQ implements the Constitution). Indeed, the fundamental purpose of the relevant permitting statutes, as with MEPA, is to ensure Defendant agencies are fulfilling their constitutional obligations to protect Montana's environmental life support system from degradation and to prevent unreasonable depletion and degradation of Montana's natural resources. §75-2-102, MCA (the Legislature enacted the Montana Clean Air Act "mindful of its constitutional obligations under Article II, section 3, and Article IX of the Montana constitution."); §82-4-202, MCA (same for Montana Strip and Underground Mine

Reclamation Act); §82-4-102, MCA (same for Strip and Underground Mine Siting Act); §75-20-102, MCA (same for Montana Major Facility Siting Act).

As this Court explained in *Park County,* the government has an affirmative duty to protect Montanans' right to a clean and healthful environment *pursuant to Article IX, Section 1 and Article II, Section 3 of the Constitution*. *Park Cnty.*, ¶63. Here, the District Court held, based on detailed factual findings, that "Montana's climate, environment, and natural resources are unconstitutionally degraded and depleted due to the *current* atmospheric concentration of GHGs and climate change." COL #50 (emphasis added). Moreover, "[e]very additional ton of GHG emissions exacerbates Plaintiffs' injuries and risks locking in irreversible climate injuries." COL #6; *see also* FOF #83, 85, 89, 91-92. Once Defendants start considering the full range of environmental impacts stemming from fossil fuel projects, and reasonable alternatives, the Court should expect Defendants to bring their substantive permitting decisions into constitutional compliance. *Franklin*, 505 U.S. at 803. Such a result is likely because the undisputed record shows Montana can meet 100% of its energy needs with renewable energy by no later than 2050. FOF #272; MJ-29. Such a transition is technically and economically feasible and would save Montanans over $6 billion *annually* on energy costs, eliminate $21 billion in climate costs, all while keeping Montana's lights on, cleaning up the air

and environment, and using less of Montana's land resources. FOF #275, 281; MJ-39.

Importantly, the District Court recognized that if the substantive permitting statutes do not grant Defendants discretion to deny permits to avoid constitutional violations, those statutes are *per se* unconstitutional. COL #23. The District Court, citing the doctrine of constitutional avoidance, appropriately declined to declare the substantive permitting statutes unconstitutional, concluding instead Defendants cannot permit "fossil fuel activities that would result in unconstitutional levels of GHG emissions, unconstitutional degradation and depletion of Montana's environment and natural resources, or infringement of the constitutional rights of Montanans and Youth Plaintiffs." COL #24. Accordingly, absent the MEPA Limitation, Defendants could act to prevent the harms revealed in a MEPA analysis of climate change impacts by denying or conditioning permits, pursuant to substantive permitting statutes, for activities that result in unconstitutional levels of GHG emissions. COL #22. Moreover, absent the Judicial Prohibition, in accordance with *Park County*, Plaintiffs could obtain judicial remedies necessary to meet the State's "anticipatory and preventative" constitutional obligations. *Park Cnty.*, ¶72. In sum, affirming the District Court's conclusion that the MEPA Limitation and Judicial Prohibition are unconstitutional, and enjoining their implementation, will alleviate and prevent Plaintiffs' climate injuries.

b. The Remedy Need Not Solve Global Climate Change to Alleviate Plaintiffs' Climate Injuries

While it is true that enjoining the MEPA Limitation will not remove Montana's previously emitted GHG emissions from the atmosphere or by itself reduce the atmospheric concentration of CO_2 to 350 ppm, Agency Br. 26-27, such a result is not required for Plaintiffs to establish that their past, present, or threatened injuries will be alleviated. *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 13 (1992) ("Even though it is now too late to prevent, or to provide a fully satisfactory remedy [for Plaintiffs' every injury] . . . a court does have power to effectuate a partial remedy.").[22] The undisputed evidence before the District Court established that a reduction in Montana's GHG emissions will alleviate Plaintiffs' present and threatened injuries by reducing the risk of future climate harms because the GHG emissions emitted *today* will determine the severity of Plaintiffs' injuries in the future. COL #20; FOF #98 ("The choices and actions implemented in this

[22] Contrary to Defendants' assertions, the dispositive redressability issue in *Juliana* was not whether courts are foreclosed from granting *any* relief in a constitutional climate case, but whether the court could require the federal government to prepare a climate recovery plan. *Juliana v. United States*, 947 F.3d 1159, 1169, 1173 (9th Cir. 2020). Here, the relief granted—declaring laws unconstitutional and enjoining their implementation—is squarely within the powers of Montana's courts. Similarly, Defendants' reliance on *Washington Env't Council v. Bellon*, 732 F.3d 1131, 1142 (9th Cir. 2013) is unpersuasive because, unlike *Bellon* (and *Juliana*), here there is a detailed trial record and extensive findings of fact establishing causation and redressability and Defendants do not argue any of the factual findings are clearly erroneous.

decade will have impacts now and for thousands of years."). As Dr. Running explained, all GHG emissions matter because they expose Plaintiffs to more serious harms in the future. Tr. 137:10-15; *see also* Tr. 168:7-169:7 (CO_2 emissions remain in the atmosphere for centuries, requiring prompt emission reductions). Dr. Whitlock testified that Montana's reliance on fossil fuels is "inconsistent with the need to reduce emissions to stabilize the climate system" and "penalize our children and future generations," including youth Plaintiffs. Tr. 324:5-13. Consistent with the undisputed trial testimony, the District Court found, "[a]ctions taken *by the State* to prevent further contributions to climate change will have significant health benefits to Plaintiffs." FOF #139 (emphasis added); *see also* FOF #98, 137, 160, 237, 268.

That is true regardless of what happens in other countries. Agency Br. 27. As Mr. Erickson explained, "every ton of CO_2 matters . . . and matters equally. That means it doesn't really matter . . . to the atmosphere whether Montana's emissions are bigger or smaller than someone else's. They matter on their own." Tr. 990:14-21; *Ctr. for Biological Diversity*, 538 F.3d at 1217 ("[T]he fact that climate change is largely a global phenomenon that includes actions that are outside of [the state's] control does not release [the state] from the duty of assessing the effects of *its* actions on global warming within the context of other actions that also affect global warming.") (citation omitted; emphasis in original). The District Court's factual findings that a reduction in Montana's GHG emissions will minimize future climate

harms and alleviate Plaintiffs' climate injuries are based on uncontested trial testimony, and Defendants do not establish they are clearly erroneous.

iii. The District Court Correctly Concluded that the Judicial Prohibition Is Not a Barrier to Redressability

The Judicial Prohibition's elimination of preventative remedies for MEPA violations is not a barrier to redressability because the District Court correctly held it is facially unconstitutional. COL #25-29. On appeal, Defendants do not defend the constitutionality of the Judicial Prohibition or argue the District Court erred in conforming its final judgment to adjudicate its constitutionality, thereby waiving any such arguments. *Mountain W. Farm Bureau*, ¶9. Consistent with Rule 15(b)(2), M.R.Civ.P., and Montana's jurisprudence, the District Court appropriately resolved the constitutionality of the Judicial Prohibition after Defendants interjected it into this case by raising it as a barrier to redressability during trial. Doc. 396 at 2-7; FOF #64.

Rule 15(b)(2) provides that "[w]hen an issue not raised by the pleadings is tried by the parties' express or implied consent, *it must be treated in all respects as if raised in the pleadings*." (emphasis added); *Dunn v. TWA*, 589 F.2d 408, 413 (9th Cir. 1978) (even absent formal amendment, Rule 15(b) amendment to pleadings was proper because opposing party referred to unpleaded matter in its trial memorandum). This Court's precedent is clear that constitutional questions necessary to the disposition of a case may be raised at any point, provided they could

not have been raised earlier. *MEA-MFT v. McCulloch*, 2012 MT 211, ¶14 (this Court considers the constitutionality of provisions necessary to the disposition of the case).

Here, Plaintiffs could not have raised a constitutional challenge to the Judicial Prohibition in their 2020 Complaint because the provision did not exist until May 19, 2023, less than a month before trial. However, Plaintiffs did present evidence at trial regarding the Judicial Prohibition. *See, e.g.*, Tr. 825:4-826:18, 1507:11-19; AH-45. Importantly, Defendants neither objected to the admission of this evidence, nor claimed that admitting the evidence prejudiced their case. *Reilly v. Maw*, 146 Mont. 145, 155 (1965) ("There is implied consent of the parties for the trial of issues not raised in the pleadings where evidence is introduced without objection."); *accord Armbrust v. York*, 2003 MT 36, ¶18. The District Court acted well within its discretion to conform the pleadings to the evidence adduced at trial and address the constitutionality of the Judicial Prohibition, as it related to redressability. Defendants present no argument to the contrary and have waived their opportunity to do so.

II. THE DISTRICT COURT CORRECTLY APPLIED MONTANA'S CONSTITUTIONAL JURISPRUDENCE TO CONCLUDE THE MEPA LIMITATION AND JUDICIAL PROHIBITION ARE UNCONSTITUTIONAL

A. Article II, Section 3, and Article IX, Section 1 Are Self-Executing; and the Legislature Has Acted

Claims brought pursuant to Article II, Section 3, and Article IX, Section 1 are self-executing and capable of judicial resolution. *MEIC*, ¶28 (affirming plaintiffs

"are entitled to bring a direct action in court to enforce" the right to a clean and healthful environment). The Constitutional Convention records confirm the delegates intended for provisions in the Bill of Rights to be self-executing. As Delegate Dahood stated, "constitutions are based on the premise that they are presumed to be self-executing, particularly within the Bill of Rights." Const. Con. Vol. 5 at 1644; *id.* at 1645 (Delegates Robinson and Dahood explaining that Article II, §3 is self-executing). Consistent with the Framers' intent, this Court has held or affirmed that other constitutional provisions in the Bill of Rights are also self-executing. *See*, *e.g.*, *Gazelka v. St. Peter's Hosp.*, 2015 MT 127, ¶7 (Article II, §4); *Matter of S.L.M.*, 287 Mont. 23, 26 (1997) (Article II, §15); *Dorwart v. Caraway*, 2002 MT 240, ¶44 (Article II, §17).

Even if this Court were to reverse its prior ruling that Article II, Section 3, and Article IX, Section 1 are self-executing and immediately enforceable, *MEIC*, ¶28, "once the Legislature has acted, or 'executed,' a provision that implicates individual constitutional rights, courts can determine whether that enactment fulfills the Legislature's constitutional responsibility." *Brown v. Gianforte*, 2021 MT 149, ¶23. Constitutional provisions that implicate fundamental rights are "in a category of their own" and the courts are the "final interpreters of the Constitution [and] have the final 'obligation to guard, enforce, and protect every right granted or secured by the Constitution. . . .'" *Columbia Falls Elementary Sch. Dist. No. 6 v. State*, 2005 MT

69, ¶18 (internal citations omitted); *Merlin Myers Revocable Tr. v. Yellowstone Cnty*., 2002 MT 201, ¶¶19-21 (Montana courts have "exclusive power" to interpret the right to clean and healthful environment); *see also McLaughlin v. Mont. State Legislature*, 2021 MT 178, ¶18. Relying on this Court's jurisprudence, the District Court correctly determined the Legislature had executed a statute that implicates fundamental constitutional rights, and that it could review the enactments for constitutional compliance. COL #32-34; §75-1-102(1), MCA.

The State advances a novel argument that the MEPA Limitation is not a "legislative act," and advocates for a new test that whether something is a "legislative act" depends on whether it resolves a "threshold political question." State Br. 22. That strained argument has no support in Montana's jurisprudence and is directly contradicted by the definition of a "legislative act," which means "actions by a legislative body that result in creation of law or declaration of public policy"; or "other actions of the legislature authorized by Article V of The Constitution of the State of Montana." §2-9-111(1)(c)(i)(A), (B), MCA; *Town of Whitehall v. Preece*, 1998 MT 53, ¶18 (creating a new law is a legislative act). Clearly the Legislature acted in passing HB 971 and SB 557, which resulted in the MEPA Limitation and the Judicial Prohibition becoming law. After all, the Legislature enacted MEPA, "mindful of its constitutional obligations," §75-1-102(1), MCA, and established the environmental review requirements to ensure that "environmental

attributes are fully considered by the legislature in enacting laws to fulfill constitutional obligations." §75-1-102(1)(a), MCA. Moreover, the State's argument ignores this Court's holding in *Park County* striking down as unconstitutional a provision similar to the Judicial Prohibition. *Park Cnty*., ¶¶57, 84. Consistent with its ruling in *Park County*, this Court recently explained in *Driscoll v. Stapleton*:

> Once the legislative branch has exercised its authority to enact a statute, whether through legislative referendum or a bill signed by the Governor, it is within the courts' inherent power to interpret the constitutionality of that statute when called upon to do so. A court is thus duty-bound to decide whether a statute impermissibly curtails rights the constitution guarantees.

2020 MT 247, ¶11 n.3.

Reviewing statutes for constitutionality fits within Montana's separation of powers doctrine, whereby *only* the judiciary can determine the constitutionality of laws. Mont. Const. art. III, §1; *Larson*, ¶39 ("[I]t is particularly within the province of the judiciary to construe and adjudicate provisions of constitutional . . . law as applied to facts at issue in particular cases."). Accordingly, the constitutional questions at issue here do not raise political questions, State Br. 24-25, and this Court should reject Defendants' attempts to consolidate power in the political branches and undermine its duty to say what the law is. *See* Doc. 217 (rejecting Defendants' political question arguments); *McLaughlin*, ¶64 (McKinnon, J., concurring) (Montana "is not seventeenth century England," and this Court has the

"constitutional responsibility" to determine whether legislative actions "infringe[] upon fundamental rights . . . .").

In sum, the constitutional provisions implicated here are self-executing and the District Court correctly exercised its judicial duty—consistent with Montana's constitutional separation of powers doctrine—to determine whether the MEPA enactments fulfill the Legislature's constitutional responsibilities or violate the youth Plaintiffs' fundamental rights. *Brown v. Gianforte,* ¶23; *Columbia Falls*, ¶¶15, 18.

B. Constitutional Convention Records and Montana Precedent Confirm it Is the Judiciary's Duty to Determine the Meaning and Scope of the Right to a Clean and Healthful Environment

While the State questions the role of the judiciary in interpreting the right to a clean and healthful environment, State Br. 17-18, the Constitution's Framers knew that to realize their intent to maintain and improve Montana's environment, courts would have an integral role to play. Indeed, the State concedes the Constitutional Convention records confirm the delegates anticipated "judicial interpretation would resolve [the] question" as to what attributes comprise a clean and healthful environment. State Br. 21 (citing Const. Con. Vol. 5 at 1235). Their concession is supported by the clear Constitutional Convention record, as well as the trial testimony of Delegate Mae Nan Robinson (now Ellingson), whose Convention statements this Court and the State have relied on. FOF #284; *Park Cnty.*, ¶¶64, 76.

Review of the Constitutional Convention debate surrounding whether the adjectives "clean" and "healthful" should be included in Article IX, Section 1 confirms that delegates advocating for inclusion of the adjectives did so knowing that the *courts* would be called upon to interpret their meaning. As Delegate Robinson stated: "I'm not going to attempt to tell you . . . what these things [clean and healthful] mean; *but I can guarantee to you that the Supreme Court will certainly be able to tell you*." Const. Con. Vol. 5 at 1235 (emphasis added). Delegate Robinson explained, "we need these qualifying adjectives *to enable the Supreme Court* to interpret what kind of environment we want. Without these qualifying adjectives, *the court* is going to have a very hard time." *Id*., Vol. 4 at 1204 (emphasis added). As Delegate Aronow cogently noted regarding the proposed environmental provisions: "Those statements are meaningless unless you have an independent Judiciary that's willing and able to enforce those rights guaranteed to you." *Id*., Vol. 4 at 1070.[23] The delegates intentionally placed their trust in the courts, not the legislature,[24] to interpret the meaning of the constitutionally enshrined protections

[23] *See also* Nathan Bellinger & Roger Sullivan, *A Judicial Duty: Interpreting and Enforcing Montanans' Inalienable Right to a Clean and Healthful Environment,* 45 Pub. Land & Res. L. Rev. 1, 12-17 (2022) (detailing relevant Constitutional Convention history).

[24] Delegate Robinson argued: "The present problems we have with our environment are the product of the inability or unwillingness of legislatures to recognize environmental problems and to take proper corrective action." Vol. 5 at 1229; *id*. at

for Montana's clean and healthful environment, just as the courts interpret other terms in the Bill of Rights. *Id*., Vol. 5 at 1240 (Delegate Robinson expressing confidence that the judiciary can interpret the meaning of "clean" and "healthful" just as it interprets the meaning of other inalienable rights.).

Montana's courts have the authority and competency to evaluate the scope and meaning of the constitutional right to a clean and healthful environment, just as they routinely do with Montanans' other fundamental constitutional rights. *See, e.g.*, *Armstrong v. State*, 1999 MT 261, ¶¶39-53; *Wadsworth v. State*, 275 Mont. 287, 299 (1996); *Becky v. Butte-Silver Bow Sch. Dist.*, 274 Mont. 131, 135 (1995); *State v. Nelson*, 283 Mont. 231, 241 (1997); *State v. Hardaway*, 2001 MT 252, ¶16; *State v. Goetz*, 2008 MT 296, ¶27; *Mont. Coal. for Stream Access, Inc. v. Curan*, 210 Mont. 38, 53 (1984). The Constitutional Convention records, and the judiciary's longstanding tradition of saying what the law is in Montana, *In re Lacy*, 239 Mont. 321, 325 (1989), confirm the District Court had the clear authority and duty to interpret the scope of the right to a clean and healthful environment, in the context of a fully developed trial record that includes extensive scientific evidence.

C. The Challenged Statutes Implicate the Youths' Right to a Clean and Healthful Environment

1232 (Delegate Reichert expressing distrust with the Legislature's ability to protect the environment).

This Court has made clear that laws "implicating" either of Montana's constitutional provisions securing the right to a clean and healthful environment are subject to strict scrutiny. *Park Cnty.*, ¶60. Accordingly, the key inquiry, as the State admits, is whether the challenged MEPA provisions implicate the Constitution's environmental protections. State Br. 25; *Park Cnty.*, ¶61.

As "the strongest environmental protection provision found in any state constitution," Montana's constitutional environmental protections are "both anticipatory and preventative" and do "not require that dead fish float on the surface of our state's rivers and streams before [the Constitution's] farsighted environmental protections can be invoked." *Park Cnty.*, ¶61 (citing *MEIC*, ¶¶ 66, 77). As this Court stated in *Park County,* the unambiguous text of the Constitution seeks to "to ensure that Montanans' inalienable right to a 'clean and healthful environment' is as evident in the air, water, and soil of Montana as in its law books." *Id.* ¶62. Defendants have an "affirmative duty" to realize and secure Montanans' fundamental right to a clean and healthful environment. *Id.* ¶63.

As the trial record and District Court's Order make clear, this case is about harm to *Montana's* environment, natural resources, and climate (and consequently its children) caused by GHG pollution and climate change. The State's argument that the Framers were not concerned with "global issues," State Br. 18, 20-21, mischaracterizes the distinctly local environmental degradation and injuries at the

center of this case. Based on undisputed trial testimony from renowned scientific experts, the District Court found *Montana's* climate, rivers, lakes, groundwater, atmospheric waters, forests, glaciers, fish, wildlife, air quality, and terrestrial ecosystems are being drastically altered and degraded due to climate change. FOF #125, 140-193; FOF #194-208 (harms to Montana Plaintiffs); FOF #209-237 (Defendants' actions cause and contribute to climate harms in Montana). Explaining the localized harms in Montana, the District Court found:

> Anthropogenic climate change is impacting, degrading, and depleting *Montana's* environment and natural resources, including through increasing temperatures, changing precipitation patterns, increasing droughts and aridification, increasing extreme weather events, increasing severity and intensity of wildfires, and increasing glacial melt and loss.

FOF #140 (emphasis added).

The Delegates saw Montana's environment in 1972 as already too degraded, and as Delegate McNeil stated, "our intention was to permit no degradation from the present environment of Montana and affirmatively require enhancement of what we have now." Const. Con. Vol. 4 at 1205; *see* FOF #231 ("Montana's GHG emissions have grown significantly since the passage of the 1972 Montana Constitution."). Accordingly, the Delegates enshrined the constitutional directive to "maintain *and improve*" Montana's environment. Mont. Const. art. IX, §1(1) (emphasis added); *MEIC*, ¶77. The Delegates also expressed intergenerational concerns, making clear their goal to protect Montana's environment for both current and future generations.

See, e.g., Const. Con. Vol. 4 at 1208 (Delegate James); Const. Con. Vol. 5 at 1238 (Delegate Siderius); *see also* Mont. Const. pmbl.; *MEIC*, ¶76; Mont. Const. art. IX, §1(1).

The District Court's conclusion that Montana's constitutional protections for the State's environment and environmental life support system include protecting *Montana's* climate is consistent with the intent of the constitutional delegates to enact a constitutional provision that is as comprehensive and protective as possible. CL #49-50 (holding that "*Montana's climate*, environment, and natural resources are unconstitutionally degraded . . . ." (emphasis added)). As Delegate McNeil explained, when drafting Article IX, Section 1, the "committee intentionally avoided definitions, to preclude being restrictive. And the term 'environmental life support system' *is all-encompassing, including but not limited to air*, *water, and land* . . . ." *MEIC*, ¶67 (emphasis added) (citing Const. Con. Vol. 4 at 1201); *see also In re Maui Elec. Co., Ltd.*, 506 P.3d 192, 202 n.15 (Haw. 2022) (the right to "clean and healthful environment" in Article XI, §9 of Hawai`i's Constitution includes "a right to a life-sustaining climate system").

The reference to "air, water, and land" is consistent with the Delegates' intent to protect Montana's climate, which encompasses the interconnectedness of these constitutionally protected natural resources, including the State's rivers, lakes, and atmosphere. FOF #167; Mont. Const. art. IX, §3(3); JS-8. Moreover, to prevent the

degradation and depletion of Montana's environment and natural resources, the climate system must be stabilized and protected. FOF #85, 89, 140-141, 170. In short, the statutes challenged here implicate *Montana's* constitutionally protected environment and natural resources, *including* climate. The fact that climate change impacts extend beyond Montana, as do many environmental harms that traverse political borders, does not give Defendants unchecked authority to contribute to climate degradation within Montana.

There can be no question that the MEPA Limitation, which prohibits government consideration of known pollutants, GHG emissions, and their ensuing climate harms, implicates the right to a clean and healthful environment. *MEIC*, ¶¶79-80. The MEPA Limitation deliberately thwarts the explicit, constitutionally grounded purposes of MEPA by requiring agencies to ignore scientific information about GHG emissions and climate harms when permitting fossil fuel activities, which Defendants *know* are already degrading and depleting Montana's natural resources and environment. FOF #243, 245-251, 253-256, 260-265. Given the pervasive harm GHG pollution and climate impacts are already causing to Montana's climate, environment, natural resources, and its youth, FOF #104-193, "[t]he need for fully informed and considered decision making could hardly be more pressing." *Park Cnty.*, ¶73. Yet the MEPA Limitation renders it impossible for agencies to exercise their existing statutory authority in a constitutional manner

through informed decision-making—whether that authority is implemented to consider an application for an air quality permit for a fossil fuel power plant or a permit for a fossil fuel extracting project such as a coal mine or oil well. FOF #255-256, 259-264. Consistent with the trial record, this Court's jurisprudence, and the intent of the constitutional delegates, there can be no question that the MEPA Limitation implicates the right to a clean and healthful environment. *MEIC*, ¶¶79-81.

Though Defendants do not defend the constitutionality of the Judicial Prohibition on appeal, it too implicates the right to a clean and healthful environment by foreclosing equitable remedies, even when there is a legally deficient MEPA review. COL #25, 29. The plain language of the Judicial Prohibition states a court cannot "vacate, void, or delay a lease, permit, license, certificate, authorization, or other entitlement or authority," *even if* an environmental review inadequately considers GHG emissions and impacts to Montana's climate, or otherwise fails to meet the requirements of MEPA. FOF #63. Such a statute negates Defendants' "anticipatory and preventative" constitutional obligations, *Park Cnty.*, ¶72, by allowing fossil fuel projects to proceed *even if* an attendant MEPA analysis concerning GHGs or climate change impacts was either legally deficient, or revealed the proposed project would significantly degrade Montana's environmental life support systems. The Judicial Prohibition represents yet another attempt by

Defendants to lock in their unconstitutional pattern and practice of authorizing fossil fuel activities while remaining deliberately ignorant of the devastating harms inflicted upon the environment, youth Plaintiffs, and the people of Montana. Such a law plainly contrary contravenes the State's constitutional obligation to "provide Montanans with remedies adequate to prevent unreasonable degradation of their natural resources," and directly implicates Plaintiffs' constitutional rights. *Park Cnty.*, ¶¶74, 79, 89.

The State's familiar refrain, that MEPA is a mere procedural statute, State Br. 25, was already rejected by this Court in *Park County*. ¶¶56, 67, 70, 74 (describing "essentially irreversible" harm allowed by the challenged MEPA provision). The State's reliance on *Netzer* is inapposite. State Br. 25. In *Netzer,* this Court denied plaintiff's request for a preliminary injunction because the plaintiff had alternative means to reduce indoor air pollution. *Netzer Law Office v. State*, 2022 MT 234, ¶21. The "narrow" decision did "not decide the merits" of the plaintiff's claim, and has no bearing on the present case as Defendants presented no evidence at trial that Plaintiffs have alternative means to alleviate their *proven* constitutional injuries. *Id.* ¶¶ 15, 21; *see supra* I.B.

Consistent with this Court's precedent in *MEIC* and *Park County*, the MEPA provisions at issue here, which foreclose consideration of pollutants known to harm human health and the environment (MEPA Limitation), and foreclose equitable

remedies (Judicial Prohibition), implicate and burden Plaintiffs' constitutional rights to a clean and healthful environment, among other constitutional rights, and therefore, strict scrutiny applies. *MEIC*, ¶¶79-80, *Park Cnty.*, ¶¶78-79.

D. Neither the MEPA Limitation nor the Judicial Prohibition Survive Strict Scrutiny

To overcome strict scrutiny, Defendants have the burden to demonstrate the statutes are "narrowly tailored to further a compelling government interest." *Park Cnty.,* ¶84; *Driscoll*, ¶18. At no point during this case, including at trial, have Defendants presented *any* evidence of a governmental interest, let alone a compelling government interest, to justify the MEPA Limitation or Judicial Prohibition. COL #25-29, 62-67. On that basis alone, this Court should affirm the District Court's holding that the statutes are facially unconstitutional. *Columbia Falls*, ¶¶29, 31 ("unchallenged findings" by the District Court demonstrate that the school funding system is unconstitutional); *Park Cnty.*, ¶84.

Now, for the first time, *without any factual or legal support*, the State argues it has a compelling interest in balancing the right to use property with the right to a clean and healthful environment. State Br. 27-28. However, just because the State "alleges a compelling interest, does not obviate the necessity that the State *prove* the compelling interest *by competent evidence*." *Wadsworth*, 275 Mont. at 303 (emphasis added); *Armstrong*, ¶41 n.6 (To demonstrate an interest is compelling to justify infringement of a fundamental right, the state must show "at a minimum,

some interest 'of the highest order . . . and not otherwise served.'") (citation omitted). The time for the State to prove a compelling interest for the challenged statutes was at trial. Here, the State has done nothing more than allege, without any evidence, a purported compelling interest that has already been rejected. *Park Cnty.*, ¶79 (rejecting the State's request to "balance[] environmental rights against the private property rights also found in the Montana Constitution").

Defendants likewise presented no evidence at trial to support their assertion that the MEPA provisions are "the least onerous path" to effectuate this interest. *Weems v. State*, 2023 MT 82, ¶44 (quotation omitted); COL #65-67. Defendants did not present any evidence to the District Court that the right to use property would be implicated by declaring the challenged statutes unconstitutional. In short, there is no evidence as to how either the MEPA Limitation or Judicial Prohibition secure the State's purported compelling interest, or that it is the least onerous way to do so. On the contrary, there is abundant evidence that fossil fuel pollution and climate impacts are already causing harm to private property in Montana, including to the property of Plaintiffs Rikki, Lander, Badge, Kian, Claire, Taleah, and Eva. FOF #130, 186, 195(a), (f), (m), (o), 196(h), 198(a), 202(e)-(f), 203(a), 204(d)-(e), (h); Tr. 775:5-24; P6 at P-0001152 (admitted Doc. 391). If the State were truly concerned about protecting the property rights of all Montanans, the appropriate course of action would be to respond to climate change with an appropriate sense of urgency.

Based on the factual record before it—detailing ongoing degradation and depletion of Montana's environment, natural resources, climate, and resultant harm to the Plaintiffs—and this Court's constitutional jurisprudence, the District Court correctly evaluated the constitutionality of the MEPA Limitation and Judicial Prohibition on the merits, and found they implicate the right to a clean and healthful environment and do not pass strict scrutiny. Accordingly, the District Court's conclusions of law are correct and should be affirmed in full.

III. THE DISTRICT COURT'S DENIAL OF DEFENDANTS' REQUEST FOR RULE 35 EXAMINATIONS WAS NOT AN ABUSE OF DISCRETION

The State's argument that the District Court abused its discretion in denying its request for Rule 35 examinations is a red herring because Defendants do not dispute Plaintiffs are experiencing justiciable injuries separate and apart from their mental health injuries, as Plaintiffs' undisputed trial testimony made clear. Agency Br. 12-13; State Br. 4. Therefore, even if this Court were to find the District Court abused its discretion in denying Defendants' Rule 35 motion, which *it did not*, such denial constitutes harmless error because denial did not affect Defendants' substantial rights and Plaintiffs have cognizable injuries even absent consideration of their psychological harms, as the District Court noted. *See supra* I.A; Doc. 225 at 9; *Matter of Est. of Edwards*, 2017 MT 93, ¶50.

A. Defendants' Requested Irrelevant Rule 35 Exams

The justiciable injuries Plaintiffs are experiencing, including their mental health injuries, establish standing and constitutional injuries, *not* monetary damages, and do not require a formal diagnosis or treatment. Defendants nonetheless attempted to subject eight Plaintiffs to two-hour psychological examinations and testing under the DSM-5-TR, and to intrude upon matters that are wholly irrelevant to this case, such as Plaintiffs' behavioral history, alcohol and drug use, school performance, and exposure to childhood trauma, pursuant to Rule 35(a), M.R.Civ.P. Doc. 173 at 2-3. Most of the Plaintiffs to be examined were minors at the time, and parents would have been prohibited from attending the examination with their children. Doc. 173 at 4.

B. The Rule 35 Standard Gives Discretion to the District Court

A Rule 35 examination is an "extraordinary form of discovery" which is permitted "only when the plaintiff's mental condition is in controversy, and then only when good cause has been shown." *State ex rel. Mapes v. Dist. Ct. of Eighth Jud. Dist.*, 250 Mont. 524, 532 (1991); *In re Marriage of Binsfield*, 269 Mont. 336, 341 (1995). A defendant's purported need for Rule 35 exams "must be balanced against the plaintiff's constitutional right to privacy under Montana Constitution Article II, Section 10." *Lewis v. Mont. Eighth Jud. Dist. Ct.*, 2012 MT 200, ¶6. Granting a Rule 35 request "is discretionary" even "when the party's mental condition is in controversy and good cause shown." *Binsfield,* 269 Mont. at 340;

Lewis, ¶8. Rule 35 examinations are "the most intrusive and, therefore, the most limited discovery tool." *Simms v. Mont. Eighteenth Jud. Dist. Ct.*, 2003 MT 89, ¶30. On appeal, Defendants must show the District Court abused its discretion in denying its request for Rule 35 examinations. *Pumphrey*, ¶16.

C. The District Court Properly Exercised its Discretion in Denying Defendants' Motion for Rule 35 Examinations

i. Plaintiffs' Mental Health Is Not Genuinely in Controversy

While Rule 35 examinations are sometimes permitted in cases where plaintiffs seek monetary damages, Defendants do not provide a single legal authority to support their argument that Rule 35 examinations are appropriate here, where Plaintiffs' claims are grounded in Montana's Constitution and their requested remedies are equitable in nature. *Mapes*, 250 Mont. at 530. Accordingly, the District Court appropriately relied on this Court's jurisprudence to hold, "Defendants have failed to show that Plaintiffs' mental health is really and genuinely in controversy." Doc. 225 at 6. Key to the District Court's ruling was that testimony from Plaintiffs' expert (Dr. Lise Van Susteren) was "not being offered to support an independent claim for emotional distress damages, but as part of standing to challenge the constitutionality of statutes." Doc. 225 at 4-5.

Defendants provide no legal support for their claim that simply testifying about mental health puts it in "controversy," thereby always justifying Rule 35 examinations. *See Lewis*, ¶8 (setting forth factors courts consider in evaluating

whether mental health is in controversy, none of which applies here).[25] The purpose of having Plaintiffs' expert reference aspects of Plaintiffs' mental health was to support their standing and constitutional injury arguments, which Defendants disputed. Doc. 225 at 5; *see also, Gryczan*, 283 Mont. at 446 ("specific psychological effects" can satisfy standing requirements).

The State's strained effort to characterize psychological harms as "the very heart of the District Court's reasoning" is disingenuous and serves only to try and justify the State's attempt to employ Rule 35 to intrude upon these youth Plaintiffs' constitutional right to privacy. State Br. 32. The undisputed fact remains that this case is a constitutional challenge to statutes, where no claim for emotional damages is being made, and where clear mental health injuries are one important element in a multitude of Plaintiffs' physical, emotional, economic, recreational, cultural, property, and other injuries found at trial. FOF #195-207. The District Court properly understood and analyzed Plaintiffs' claims of emotional harm as related to standing and constitutional injuries, and therefore *not* an issue "really and genuinely in controversy" as it is in cases involving claims for damages. *Cf. Binsfield,* 269

[25] As Defendants admit, Dr. Van Susteren did not rely on her private conversations with Plaintiffs during her trial testimony, did not offer any diagnosis or treatment plans, and did not perform any psychological testing. State Br. 34-35; Tr. 1174:6-20, 1175:20-1176:4. Dr. Van Susteren's trial testimony regarding Plaintiffs was based exclusively on their trial testimony. Tr. 1173:24-1174:2, 1175:9-17.

Mont. at 341 (quotation omitted). Moreover, the District Court disagreed with Defendants' assertion that Plaintiffs' standing turned solely on the issue of psychological harm, Doc. 225 at 6, which the District Court's final Order confirmed, finding Plaintiffs had proven numerous injuries separate and apart from mental health injuries. FOF #195-207. The District Court acted within its discretion, and in accordance with this Court's jurisprudence, in finding Plaintiffs' mental health is not "at the center of this case, nor is it really and genuinely in controversy," such that it was an abuse of discretion to deny a Rule 35 examination. Doc. 225 at 6.

ii. Defendants Failed to Establish Good Cause for Rule 35 Examinations

The separate good cause requirement "is not to be taken lightly," and "requires a greater demonstration of need than the traditional relevancy standard in the discovery process." *Simms*, ¶¶30, 33. Here too, the District Court properly exercised its discretion in concluding: "Even if Plaintiffs' mental health were in controversy," Defendants failed to establish "good cause" for the requested Rule 35 examinations, which it properly characterized as a "fishing expedition." Doc. 225 at 7.

Defendants acknowledge that the "various criteria" courts apply "to judge the good cause element . . . do not quite fit the present situation," which does not involve "tort claims or emotional distress damages." State Br. 36. Plaintiffs agree. There is no precedent supporting good cause for Rule 35 examinations in the present case. The District Court correctly found the State's claims of "good cause" for these

examinations were beyond the law, finding the State's desired psychological examinations were too broad in scope, too great a threat to Plaintiffs' privacy, and unnecessary given alternative means for the State to obtain relevant information. Doc. 225 at 7-8.

Following the Order denying the Rule 35 examinations, the State availed itself of the "ample alternatives" suggested by the District Court, deposing all eight Plaintiffs for whom it had sought to impose full psychological examinations as well as Plaintiffs' mental health expert. Doc. 225 at 7-8; *Malloy v. Mont. Eighteenth Jud. Dist. Ct.*, No. OP 11-0038, at 11-12 (Mont. Mar. 31, 2011) (denying a medical examination when there were less intrusive means available to obtain the desired information). The State also retained a mental health expert, who filed an expert report (though was not called to testify at trial), and could have challenged the testimony of Plaintiffs or Plaintiffs' expert. State Br. 37.[26] At trial, the State could have cross-examined Plaintiffs about their mental health injuries, an option it declined to exercise. The State's suggestion that it choose to forego cross-examining Plaintiffs on their emotional injuries to avoid a "public spectacle," State Br. 37, lacks

[26] While the State claims their rebuttal witness was "handicapped," they neglect to note that their rebuttal witness was provided the full expert disclosure of Dr. Lise Van Susteren, including the confidential Plaintiff profiles (which were not used as evidence at trial). Further, the State asserted no objection at trial concerning information available to their rebuttal witness.

support in the trial record as no such objection or offer of proof was made. Moreover, the State could have requested confidential proceedings to question Plaintiffs about their mental health.

In sum, the District Court committed no errors of law or abuse of discretion when performing the necessary balancing of the parties' interests in evaluating and denying the State's Rule 35 motion. *Lewis*, ¶6. The State's claims of prejudice are unsubstantiated, not preserved in the trial record, and should be rejected.

CONCLUSION

These sixteen youth Plaintiffs are relying on this Court to confirm what they have learned in school: there are three branches of government, and when the political branches violate their fundamental constitutional rights, they can trust an independent judiciary to safeguard their rights. As Delegate Aronow stated, ensuring that Montanans' constitutional rights are "meaningful is dependent entirely upon the courts. . . . The Constitution is, true enough, the framework of government, but on the other hand, it is a last bulwark and protection that the people have." Const. Con. Vol. 4 at 1069. The District Court's August 14 Order is supported by a robust evidentiary record and Montana's jurisprudence. Accordingly, and for the foregoing reasons, the District Court's rulings should be affirmed in full.

RESPECTFULLY SUBMITTED this 13th day of March 2024.

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Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced except for footnotes and for indented material; and the word count is 17,442, as calculated by Microsoft Word, excluding those sections exempted under Rule 11(4)(d).

DATED this 13th day of March, 2024.

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